9-3/No. 56

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 56

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

February 28, 1986

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UNFAIR LABOR PRACTICE CASES

Case No. 5-CA-50147 (January 16, 1986)

U.S. Equal Employment Opportunity Commission, Chicago District Office, Chicago, Illinois and National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO

Case No. 5-CA-50337 (January 30, 1986)

Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Local 214, AFL-CIO

Case No. 7-CA-50286 (February 24, 1986)

Headquarters, 4th Infantry Division Fort Carson, Colorado and American Federation of Government Employees, AFL-CIO, Local 1345

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3.F 31/21-3:

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, CHICAGO DISTRICT OFFICE,
CHICAGO, ILLINOIS

Respondent

and

Case No. 5-CA-50147

NATIONAL COUNCIL OF EEOC LOCALS,
No. 216, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on November 26, 1985, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., January 16, 1986

Harold D. Kessler

Harold D. Kessler
Managing Director for Case Processing

[5-CA-50147]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, CHICAGO DISTRICT OFFICE,
CHICAGO, ILLINOIS

Respondent

and

Case No. 5-CA-50147

NATIONAL COUNCIL OF EEOC LOCALS
No. 216, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Calvin Washington, Esquire
Bryan Spell
For the Respondent

Rick Hampton, Esquire
Judith Ramey, Esquire
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 701 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410, et seq.

A charge was filed by the National Council of EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO, hereinafter called the Union, on February 8, 1985. A first amended charge was filed on March 4, 1985; a second amended charge was filed on March 5, 1985; a third amended charge was filed on March 6, 1985; and a fourth amended charge was filed on March 26, 1985. The foregoing charge and amended charges were filed against the United States Equal Employment Opportunity Commission, Washington, D.C., hereinafter called EEOC. Pursuant to the foregoing charge, as amended, the General Counsel of the FLRA by the Director of Region V issued a Complaint and Notice of Hearing on March 29, 1985 alleging that EEOC violated Sections 7116(a)(1) and (5) of the Statute by implementing three awards without notifying the Union and giving it an opportunity to bargain concerning the impact and implementation of the said awards. Respondent filed an Answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in Chicago, Illinois. Respondent and the General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence I make the following:

Findings of Fact

At all times material herein, EEOC maintained and operated a District office in Chicago, Illinois, known as the Chicago District Office, with Kathleen M. Blunt as the Chicago District Director. She has been and is now, a supervisor and/or agent of EEOC.

At all times material herein, the Union has been certified as the exclusive collective bargaining representative of all EEOC's professional and non-professional employees, including those employees located in the Chicago District Office, and EEOC and the Union have been parties to a Master Agreement, which became effective August 29, 1981. There are approximately 100 unit employees assigned to the Chicago District Office.

At all times material herein, Rosetta Pritchard has held the office of Acting President of the Union and has been authorized, in that capacity, to receive notices of changes in conditions of employment in the Chicago District Office.

At all times material herein, incentive awards were available to employees of the EEOC at the Chicago District Office pursuant to Article 19 of the Master Agreement and EEOC Order No. 548, both of which have national application.

The Master Agreement contains the following provisions concerning incentive awards:

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> Article 19 - Incentive Awards
>
> Section a. The Parties agree that it is of mutual benefit to encourage employees to actively participate and contribute to the Agency's efficiency, effectiveness and service to the public. The EMPLOYER agrees to implement an Incentive Awards Program designed to motivate and recognize excellence in performance, exceptional achievement and constructive ideas. Such achievement shall be recognized through and in accordance with the Incentive Awards Program.
>
> Section b. The Parties agree that the Incentive Awards Program shall be implemented in accordance with the provisions of EEOC Order No. 548, any negotiated interim agreements and supplements thereto, and this Agreement.
>
> Section c. This Article in no way limits the EMPLOYER in providing awards in any other circumstances under the Agreement, Federal law or regulations.

EEOC Order No. 548 states the purpose of the EEOC Incentive Awards Program as follows:

> 2. Purpose. This order establishes the EEOC Incentive Awards Program, defines its separate elements, and prescribes the procedures for each element pursuant to the provisions of the Federal Personnel Manual (FPM) Chapter 451 and 5 USC 4506.
>
> The objective of the Incentive Awards Program are to:
>
> a. Encourage and stimulate all EEOC employees which to take an active part in improving EEOC and government operations;
>
> b. Reward individual or group efforts which contribute to efficiency, economy, or increased effectiveness in EEOC and the Federal Government; and
>
> c. Provide recognition to employees for achievements of a significant nature relating to their official employment.

EEOC Order No. 548 states the scope of the EEOC Incentive Awards Program as follows:

Scope. The Incentive Awards Program includes the following areas:

a. Employee Suggestions which are adopted (see Appendix B, Employee Suggestions);

b. Special Achievements including superior individual or group performance and/or special acts or services (see Appendices C, Special Achievement Awards and D, Quality Step Increases);

c. Noteworthy or distinguished service (see Appendix E, Honor Awards);

d. Long and faithful service (see Appendix E).

Each of these areas has specific awards which can be presented to those individuals or groups who qualify. Procedures for preparation, submission, and processing of suggestions and awards are stated in the appropriate Appendices.

With regard to special achievement awards, EEOC Order No. 548 provides the following:

1. TYPES OF SPECIAL ACHIEVEMENT AWARDS.

a. Superior Performance. This may be cash, honor, or both and may be granted to an employee for job performance that exceeds normal requirements and is sustained over a significant period of time. Only one full award may be granted to an employee or group of employees in any 12-month period.

b. Special Act or Service. This may be cash, honor, or both and may be granted to an employee or a group of employees for a single contribution. It must be in the public interest, related to official employment, and deserving of special recognition such as an act of heroism, a special project of a "one-time" nature, or some other significant contribution.

2. REQUIREMENTS.

a. Special Achievement Award for Superior Performance. Performance in two or more significant elements of the employee's position must be sufficiently outstanding to merit this award and performance in the remaining elements must be at least satisfactory. The period of superior performance must be 6 continuous months immediately preceding the recommendation in the same type of position and the same grade level.

b. Special Achievement Award for a Special Act or Service. The contribution must be of sufficient merit to justify an award for the employee(s) concerned. There is no required time period.

At 2:30 p.m. on January 24, 1985, a meeting was held by District Director Blunt with supervisors and bargaining unit employees at the Chicago District Office. At this meeting Blunt announced that she was taking money that was left over from the incentive awards to establish new early litigation identification awards. District Director Blunt announced that three awards would be made - one to the highest producer in Rapid Charge Processing for the period January 1 - September 30, 1985; one to the Equal Opportunity Specialist who identified and had accepted the most Early Litigation Identifications for the period January 1 - March 31, 1985; and one to the Equal Opportunity Specialist who completed, and had accepted by the Legal Division, the most "cause" cases.[1] Blunt did not state at the January 24, 1985 staff meeting how much of the incentive awards money she had held back or how much money would be awarded for any of these awards.[2]

Prior to January 24, 1985 incentive awards and precisely what they would be awarded for, had not been announced in advance. Normally, at the end of a period awards were determined and given for the period that had already expired; such awards had not been announced _prior_ to the start of the awards periods. Further, it had never been announced, prior to January 24, 1985, that awards would be given to the highest producer in Rapid Charge Processing for a given period of time, to the Equal Opportunity Specialist who identified and had accepted to the most Early Litigation Identifications for a given period of time, or to the Equal Opportunity Specialist who completed and had accepted by the Legal Division, the most "cause" cases.

Prior to the January 24, 1985 announcement, incentive awards, although taking high productivity into account as a criterion also considered as important criteria the quality which the other employment duties were performed. The specific criteria announced on January 24, 1985 were never established as criteria for incentive awards prior to the January 24, 1985 announcement. Further, because awards had been not announced in advance, prior to January 24, 1985, there had been no certainty that any specific number of awards would be made and the specific criteria for specifically designated awards were never known in advance.

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[1] Although these awards, as announced, were based solely upon high production, Respondent's witness is credited with respect to her testimony that the awards would not be given unless the employee performed his other duties in a satisfactory manner.

[2] Actually a total of $450, out of a total award pool of $6,900 for awards, was allocated for the three awards in question. The Union as not given any advance notice of the implementation of any of these three "new" awards.

Discussion and Conclusions

The record demonstrates that the announcement on January 24, 1985 of the three awards to be made in the future was a change in the then existing practice of giving incentive awards. The change was two fold in nature, although the two aspects are closely related. First, it was the first time awards were announced in advance, with the certainty that specifically announced awards with precise and specific criteria would be given. Secondly, it is the first time awards would be given solely for the highest producers, in the three named categories, assuming otherwise satisfactory work. In the past, although high productivity might have been an important factor other outstanding work performance was necessary and was considered; being the highest producer was never solely sufficient to justify an award.

The Incentive Awards Program was the system, as set forth in Article 19 of the Master Agreement and EEOC Order No. 548, of awarding money to employees in order to accomplish various employment objectives. As such it clearly is a condition of employment.

The change in the application of the awards program had a foreseeable impact on the employees of the Chicago District Office. Thus, the change, more particularly the advance announcement for the three awards and the criteria could foreseeably have the effect of promoting "a horse race" atmosphere among the employees and thereby have a substantial impact upon the morale of the employees. Further by setting aside, in advance, particular funds3/ for the three awards certain employees were in advance disqualified from winning such awards because they did not work in positions which permitted them to compete. Also the nature of the awards were such, based solely on being the highest producers in the areas in question, that the competing employees could be substantially affected by the way supervisors assigned incoming cases and by favoritism in the assignment of cases. Thus the changes in the incentive awards program had reasonably foreseeable impact on the employees in the Chicago District Office.

3/ Although $450 was set aside, this amount was not specified at the January 24, 1985 meeting.

Absent any privilege EEOC would be required to notify the Union of any such anticipated change in the Incentive Awards Program and, upon request, to bargain with the Union concerning the change and its impact and implementation. U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA No. 60 (1985) hereinafter called the OSHA case.

EEOC urges that there can be no unfair labor practice in the subject case because the Union, if it was dissatisfied with the changes in the awards program, should have proceeded to arbitration alleging EEOC violated the Master Agreement. The Master Agreement provides that EEOC will implement the Incentive Awards Program in accordance with EEOC Order No. 548. The subject case does not involve any alleged violation of the terms of the Master Agreement or EEOC Order No. 548. Rather, the subject case involves an alleged refusal to bargain about the impact and implementation of the change, matters not covered by the Master Agreement or EEOC Order No. 548. In this regard it is concluded that under the Master Agreement although the Union did waive certain rights to bargain about making the changes in the Incentive Awards Program, there was no clear and unmistakable waiver of the Union's right to bargain over the impact and implementation of such changes in the Incentive Awards Program. See OSHA case, supra.

The FLRA has held that where an agency makes a change it is privileged to make it must bargain about the impact upon employees if the impact is reasonably foreseeable and is more than de minimis. Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174 (1984). In determining whether the impact is more than de minimis the FLRA examines the totality of the facts and circumstances.[4]

The EEOC urges that the foreseeable affect of the changes in the Incentive Awards Program was de minimis because it involved three awards for a total of $450 out of $6,900 to be awarded in the Chicago District Office. However it must be noted that at the January 24, 1985 announcement, Blunt did not state the amount set aside for the awards. Thus the employees did not know the three awards involved $450. In any event the impact can hardly be considered de minimis. The amount of awards is largely irrelevant; awards are seen by employees as a recognition of outstanding work, great honors. This is recognized and even expressed in EEOC Order No. 548. Thus the affect on morale and employee working conditions far exceeds and transcends the monetary amounts. In fact incentive awards are recognized, in government, as an important tool in improving governmental efficiency and effectiveness and it could hardly be accepted that a change in the awards program, as the one involved here, would have only a de minimis affect upon the employees.

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[4] Cf. Department of Housing and Urban Development. 20 FLRA No. 31 (1985); Environmental Protection Agency, 20 FLRA No. 76 (1985); and Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 (1985).

EEOC did not urge that the change herein was de minimis, because it only affected a small number of employees in a nationwide unit. EEOC was wise in not making such an argument because the FLRA would not be so naive as to be taken in by such a gambit. Thus the Chicago District Office involved over 100 employees in the nationwide unit.[5] It is clear that if such an impact were found de minimis, EEOC could, district office by district office, effect a nationwide change in the Incentive Awards Program without having to notify the Union of the change and without having to bargain concerning the impact and implementation of the change. The FLRA would not let an agency avoid its bargaining obligation by such a transparent subterfuge, intentional or not. Cf. OSHA case, supra.

In light of the foregoing I conclude that EEOC was obliged to give the Union advance notice of the change in the Incentive Awards Program announced at the January 24, 1985 meeting and was obliged to bargain with the Union concerning the impact and implementation of the change. By failing to give the Union the required notice and opportunity to bargain EEOC violated Section 7116(a)(1) and (5) of the Statute.

Having found and concluded that EEOC violated Sections 7116(a)(1) and (5) of the Statute I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the United States Equal Employment Opportunity Commission, Chicago, Illinois, shall:

1. Cease and desist from:

   (a) Failing and refusing to notify the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL, CIO, or its designated representatives concerning changes in the Incentive Awards Program, and upon request, to bargain with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives concerning procedures and appropriate arrangements for employees adversely affected by the changes in the Incentive Awards Program.

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[5] The record does not establish the size of the nationwide unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives concerning changes in the Incentive Awards Program and upon request, negotiate with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives, concerning procedures and appropriate arrangements for employees adversely affected by changes in the Incentive Awards Program.

(b) Post at its facilities in Chicago, Illinois, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Director, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: November 26, 1985
Washington, D.C.

[5-CA-50147]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to notify the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives concerning changes in the Incentive Awards Program and, upon request, to bargain with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives, concerning procedures and appropriate arrangements for employees adversely affected by changes in the Incentive Awards Program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives concerning changes in the Incentive Awards Program and upon request, negotiate with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, or its designated representatives, concerning procedures and appropriate arrangements for employees adversely affected by the changes in the Incentive Awards Program.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

[5-CA-50337]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR FORCE
BASE, OHIO

Respondent

and

Case No. 5-CA-50337

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 214 AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on December 16, 1985, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., January 30, 1986

for Jerome P. Hardiman

Harold D. Kessler, Director of Case Management

[5-CA-50337]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR FORCE
BASE, OHIO

Respondent

and

Case No.: 5-CA-50337

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 214, AFL-CIO

Charging Party

Major W. Kirk Underwood
For the Respondent

John F. Gallagher, Esquire
For the General Counsel

Mr. Paul Palacio
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Title 71 of the United States Code, Section 7101, *et seq.*,1/ and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, *et seq.*, concerns whether Respondent violated the Statute by implementing a change of condition of employment while the issue was pending before the

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory referred, *e.g.*, Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)".

Federal Service Impasses Panel when the decision of the Impasses Panel, issued some two months later, was that the parties adopt the Respondent's proposal, i.e., do what Respondent had already done. For reasons set forth more fully hereinafter, I conclude that Respondent violated §§ 16(a)(5), (6) and (1) of the Statute by implementing the change in conditions of employment while impassed proposals were pending before the Federal Service Impasses Panel. This case was initiated by a charge filed on July 5, 1985, (Jt. Exh. 1(a)) which alleged violations of §§ 16(a)(1) and (5) of the Statute; a first amended charge filed on August 13, 1985 (Jt. Exh. 1(c), which alleged violations of §§ 16(a)(1), (5) and (6) of the Statute; and a second amended charge filed on August 29, 1985 (G.C. Exh. 1(e)). The Complaint and Notice of Hearing issued on August 29, 1985 (G.C. Exh. 1(g)), alleged violations of §§ 16(a)(1), (5) and (6) of the Statute and fixed the hearing for October 8, 1985, pursuant to which a hearing was duly held on October 8, 1985, before the undersigned in Dayton, Ohio.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument which each party waived. At the close of the hearing, November 8, 1985, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of the General Counsel, to which the other parties did not object, to December 8, 1985. General Counsel and Respondent each timely mailed a brief, received on, or before, December 11, 1985, which have been carefully considered. Upon the basis of the entire record,[2] I make the following findings and conclusions:

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[2] General Counsel and Respondent each filed a motion to correct the transcript. Indeed, in his motion for extension of time within which to file post-hearing briefs, supra, General Counsel had stated that "The transcript of the hearing in the instant case is of the poorest quality. Significant testimony has been deleted, misstated, distorted and/or ambiguously presented. Testimony, including questions and answers, has been reported out of context, assigned to the wrong party, presented in a disorganized manner, and is, at present, a totally unacceptable product. . . ." My examination of the transcript had fully confirmed General Counsel's assessment. Poor as the transcript was, it appeared sufficient, together with the Exhibits, for purposes of a decision since the issue was narrow and the essential facts, which were not in dispute, were, for the most part, set forth in Exhibits, and/or discernable from the transcript. Nevertheless, the extension of time was granted to permit the parties, if they elected, to correct the transcript. I have reviewed the motions to correct the transcript, find the corrections requested wholly proper and hereby grant the motions. The transcript is hereby corrected as more fully set forth in the respective motions of the parties to correct the transcript.

Findings of Fact

1. The National Office American Federation of Government Employees, AFL-CIO (AFGE), is the certified bargaining agent for the consolidated bargaining unit composed of employees at Air Force Logistics Command facilities paid from appropriated funds and who are serviced by Air Force Logistics Command Personnel Offices, as more fully set forth in the Agreement of the parties (Jt. Exh. 2, Arts. 1 and 2), with certain exclusions, also more fully set forth in the Agreement of the parties (Jt. Exh. 2, Art. 2, Section 2.03). AFGE conducts its representation of the consolidated bargaining unit by its National Council of Air Force Logistics Command Locals, AFGE Council 214 (hereinafter referred to as the "Union"). As noted, the Union and Air Force Logistics Command are parties to a Master Labor Agreement (Jt. Exh. 2). The Air Force Communications Command, which is also a major command (Tr. 58), is serviced by Air Force Logistics Command Personnel Offices and it is conceded that its employees are part of the bargaining unit (Tr. 12, 58-59, G.C. Exh.3; Res. Exh. 1).

2. In October, 1984, Respondent unilaterally changed the policy with respect to qualification for government quarters exemption for use of non-government quarters (Tr. 13) and an unfair labor practice charge was filed on December 12, 1984, Case No. 5-CA-50068 (G.C. Exh. 1). By letter dated January 29, 1985, Respondent advised the Union in response to the unfair labor practice charge in Case No. 5-CA-50068, in part, as follows:

> "In settlement of this charge AFLC agrees to the following: AFLC employees shall return to a status quo ante situation concerning exemption from use of government quarters; that is, employees who were exempted without reference to their prior TDY schedule and/or prospective TDY schedule shall continue to be exempted. Prior to affecting any negotiable change in the rules concerning exemption from government quarters, AFGE Council 214 shall be notified of any prospective change and offered an opportunity to negotiate over the matter. Further, AFLC will make no future negotiable changes in the government quarters exemption rules without first discharging its bargaining obligation . . . [pursuant to] the Civil Service Reform Act (CSRA). . . ." (G.C. Exh. 3).

Pursuant to the settlement (Tr. 16), the Union on January 29, 1985, filed a Withdrawal Request in Case No. 5-CA-50068, which was approved by the Regional Director on January 31, 1985 (G.C. Exh. 2).

3. On January 15, 1985, the Union received notice that Respondent intended to change the rules concerning exemption from government quarters (Tr. 20); the Union submitted proposals on January 30, 1985 (Tr. 20); Respondent submitted counterproposals on February 22, 1985 (Res. Exh. 2); and, between January 30, 1985, and May 15, 1985, six negotiation sessions were held, the last two, on May 9 and 15, being mediation sessions

conducted by Commissioner Anderson of the Federal Mediation and Conciliation Service (Tr. 20, G.C. Exh. 4). Mr. Paul Palacio, President of the Union and its negotiator in this matter, testified that on May 15, when the parties could not reach agreement, he advised both the mediator, Mr. Anderson, and Ms. Sheila Hostler, Respondent's negotiator in this matter, that the Union "was requesting assistance of the Federal Impasse Panel" (Tr. 21-22).

4. By letter dated May 17, 1985, to Ms. Hostler, Mr. Palacio confirmed his intent to ". . . present the matter to the Federal Service Impasses Panel (FSIP) . . . in the very near future" (G.C. Exh. 4), and further that the Union ". . . trusts that AFLC's proposals . . . will not be unilaterally implemented." (G.C. Exh. 4).

5. By letter also dated May 17, 1985, to Mr. Palacio, Ms. Hostler advised that Respondent did ". . . intend to implement the final written proposal offered to you on 15 May 1985 . . . ten (10) days from the date of this letter." (G.C. Exh. 5).

6. On May 22, 1985, Mr. Palacio, as President of the Union, requested the assistance of the Federal Service Impasses Panel (G.C. Exh. 6), which was duly served on Respondent (G.C. Exh. 7).

7. By letter dated May 23, 1985, Mr. Val Buxton, Chief, Labor and Employee Relations Division, Directorate of Civilian Personnel, for the Commander, advised the various commands of the implementation of the change in rules regarding use of government quarters. Mr. Buxton stated, in part, as follows:

> ". . . Because we are at impasse over this issue, the 'last best offer' made to Council 214 will be implemented . . .
>
> "2. The effective date as a result of this implementation will actually be 1 July 1985. . . ."
> (Res. Exh. 4)

8. By letter dated May 29, 1985, the Federal Service Impasses Panel advised both Ms. Hostler and Mr. Palacio that it had received the request for Panel consideration of an impasse in this matter and further stated that,

> "After the Panel has completed an informal inquiry . . . you will be informed of its determination." (G.C. Exh. 8)

9. By letter dated June 28, 1985, the Federal Service Impasses Panel advised the parties of the procedures to be followed for resolution of the impasse, including: (a) submission by each party of position with supporting evidence on July 19, 1985; (b) rebuttal on August 2, 1985; (c) Panel action after considering the entire record (G.C. Exh. 9; Res. Exh. 5). By letter dated July 18, 1985, the parties agreed to extend the time for

initial submissions to July 25, 1985 (Res. Exh. 6). The parties made submissions (Res. Exhs. 7, 8 and 9); and on September 16, 1985 the Federal Service Impasses Panel rendered its decision (Res. Exh. 9) which was:

> "The parties shall adopt the Employer's proposal." (Res. Exh. 9).

Conclusions

As Respondent stated in its July 25, 1985, submission to the Federal Service Impasses Panel (FSIP), Congress in ". . . the 1984 Continuing Resolution/DOD Appropriations Act (P.L. 98-473), continued the requirement that civilian travelers use available and adequate government quarters while on official TDY . . ." but ". . . provided an exemption . . . for those employees whose duties require official travel in excess of 50 percent of the total number of . . . work weeks . . . The total number of AFLC . . . employees who travel more than 50 percent of the time is not high. The majority of those employees that do travel more than 50 percent of the time report to the Air Force Communications Command . . . Approximately 400 AFCC employees at four AFLC locations are covered by the AFLC Master Labor Agreement (MLA). Since 1979, it has been AFCC practice to grant exemption status to all identical additional positions in a unit. In other words, if one position (i.e., one individual) in a work center qualified for an exemption, then all positions (i.e., individuals) in the work center were granted the exemption. This policy was implemented in all AFCC units, including those at the four AFLC locations. . . ." (Res. Exh. 7, Attachment, pp. 1-2). (See, also, Tr. 13-15). Presumably, the same policy applied to AFLC employees (Tr. 81-82) as the record shows that Respondent proposed to make the change as to all employees in the bargaining unit, including, of course, AFCC employees as well as AFLC employees (Tr. 82, 83).

Respondent proposed to change its policy so that exemption be determined on an individual employee basis.

The sole issue is whether Respondent violated § 16(a)(1), (5) and (6) of the Statute by unilaterally implementing a change of a condition of employment while the matter, on which the parties had bargained to impasse, was pending before the FSIP.

As noted in U.S. Customs Service, 16 FLRA No. 31, 16 FLRA 198 (1984),

> "The decisions, under both the Executive Order and the Statute, have consistently held that, after impasse, changes of personnel policies and practices and matters affecting working conditions may unilaterally be implemented only if the agency 'provides the other party with sufficient notice of its intent to implement the changes (which cannot exceed the scope of the proposals advanced by that party during prior negotiations) so that the other party is afforded a reasonable

> opportunity under the circumstances to invoke the processes of the Federal Service Impasses Panel.' Internal Revenue Service, Ogden Service Center and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, FLRC Nos. 77A-40 and 77A-92, 6 FLRC 310, 320 (1978); U.S. Army Corps of Engineers, Philadelphia District, supra, [A/SLMR No. 673, 6 A/SLMR 339 (1976)], United States Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, A/SLMR No. 972, 8 A/SLMR 98 (1978); U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, supra [5 FLRA No. 39, 5 FLRA 288 (1980)]. . . ." (16 FLRA at 210) (ALJ decision, adopted by the Authority).

In the instant case, the parties agree that impasse had been reached on May 15, 1985, and on May 17, 1985, Respondent, by Ms. Hostler, gave the Union notice of its intention to unilaterally implement its final proposal, ". . . ten (10) days from the date of this letter." (G.C. Exh. 5), i.e., on May 27, 1985. On May 22, 1985, the Union did, in fact, invoke the processes of the FSIP (G.C. Exhs. 6 and 7). Notwithstanding that the Union promptly, and timely, invoked the processes of the FSIP on May 22, 1985, after Respondent's notice of May 17, 1985, of its intent to implement the change at impasse, Respondent, on May 23, 1985, by Mr. Buxton, proceeded with implementation, ". . . Because we are at impasse over this issue, the 'last best offer' . . . will be implemented . . . The effective date as a result of this implementation will actually be 1 July 1985. . . ." (Res. Exh. 4). Respondent adhered to its implementation, i.e., Respondent did not withdraw, or hold in abeyance, the change, as it stated in its submission to the FSIP (Res. Exh. 7, Attachment, pages not numbered, but on the last page of its Submission in Support of Agency Position), despite the fact that the Union had timely invoked the processes of the FSIP prior to Respondent's implementation of the change in conditions of employment as to which the parties were at impasse.

As the Authority has stated, in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA No. 61, 18 FLRA 466 (1985) (hereinafter referred to as "BATF"),

> ". . . the Respondent was obligated to bargain in good faith with the Union . . . to the point of impasse and, following the invocation of the Panel's services by the Union, to maintain the *status quo* to the maximum extent possible. In this connection, the Respondent has not demonstrated, and it does not otherwise appear, that implementation . . . was required consistent with the necessary functioning of the agency. In the absence of any such showing, the Authority finds that the failure of the Respondent to maintain the *status quo* by unilaterally implementing . . . while a negotiation dispute

> with respect to such provisions was pending before the Panel, constituted a violation of section 7116(a)(1), (5) and (6) of the Statute. Specifically, with regard to the finding of a violation of section 7116(a)(5) of the Statute, the Authority notes that the impasse resolution procedures of the Panel comprise one aspect of the collective bargaining process [footnote omitted]. By failing to maintain the status quo while matters were pending before the Panel, the Respondent therefore acted in derogation of its bargaining obligation. Additionally, and more particularly with regard to the finding of a violation of section 7116(a)(6) of the Statute, the Authority finds that the Respondent's implementation . . . essentially constituted a failure to allow the Panel to take appropriate action with respect to the unresolved bargaining issues and therefore constituted a failure to cooperate with impasse procedures as required by the Statute." (18 FLRA at 471-472).

The Authority further stated in BATF, supra, that,

> ". . . by requiring the parties to maintain the status quo to the maximum extent possible after an impasse in negotiations has been reached and the services of the Panel have been invoked in a timely manner [footnote omitted], the purposes and policies of the Statute will be effectuated by permitting the parties an opportunity to utilize the impasse resolution procedures of the Statute, thereby fostering stability in Federal labor-management relations. It should be emphasized that the foregoing policy requiring maintenance of the status quo to the maximum extent possible once the Panel's processes have been timely invoked would not preclude agency management from taking action which alters the status quo to the extent that such action is consistent with the necessary functioning of the Agency.7/ . . . To repeat, then, the Authority finds
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> ---
>
> 7/ Of course, if subsequently contested in an unfair labor practice proceeding, an agency taking such action would be required to come forward with affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency.
>
> that once parties have reached an impasse in their negotiations and one party timely invokes the services

> of the Panel, the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. A failure or refusal to maintain the status quo during such time would, except as noted above, constitute a violation of section 7116(a)(1), (5) and (6) of the Statute." (18 FLRA at 469).

Here, not only did Respondent not assert that its departure from the status quo was "consistent with the necessary functioning of the Agency" or come forward with affirmative support for such assertion, but the affirmative evidence is wholly to the contrary. For example, Mr. Palacio testified that he had learned as early as 1982 that Respondent had made efforts to change the government quarters exemption rule (Tr. 19). No change was made in 1982 and Respondent found no difficulty in functioning under the rule which it had followed since 1979. In October, 1984, Respondent did unilaterally change the rule; but when an unfair labor practice charge was filed, Respondent agreed to return to the status quo. Again, Respondent found no difficulty in functioning while maintaining the status quo. Finally, Respondent first stated that it intended to implement the change on May 27, 1985; but later made the effective date July 1, 1985, again demonstrating that it had no difficulty in functioning under the 1979 rule. Indeed, in its May 23, 1985, notice of implementation, the only justification advanced was "Because we are at impasse over this issue. . . ." (Res. Exh. 4).

Respondent has advanced two defenses. First, it cites, and relies upon, Social Security Administration, Office of Hearings and Appeals Region II, New York, New York, 19 FLRA No. 47, 19 FLRA 328 (1985) (hereinafter referred to as the SSA case). I have considered this decision carefully and find it both inapplicable and wholly distinguishable (or, perhaps more precisely, it is inapplicable because it is wholly distinguishable). The SSA case, supra, involved a relocation of the Mineola, New York Hearing office to Hempstead, New York. The decision to relocate was a reserved management right; however the agency was obligated to negotiate with regard to impact and implementation, i.e., pursuant to § 6(b)(2) and (3) as to procedures and/or appropriate arrangements for employees adversely affected. Here, negotiations concerned a change in Respondent's government quarters exemption rule, i.e., was not limited to impact and implementation. In the SSA case, supra, the matter was not before the FSIP when the move was implemented, although, as the Authority stated, ". . . Respondent did not violate the Statute when it effectuated the office relocation to avoid unnecessary Government expense [to avoid paying double rent] while continuing to cooperate with the mediation process." (19 FLRA at 329). Of course, here, the Union had timely invoked the processes of the FSIP prior to Respondent's implementation of the change. The Authority did not depart one iota in the SSA case, supra, from its holding in BATF, supra, that, ". . . following the invocation of the Panel's services" . . . Respondent must, "maintain the status quo to the maximum extent possible." Contrary to Respondent's assertion, the SSA case, supra, does not hold, either directly or by implication, that an agency is free to depart from the status quo by unilaterally implementing a change while a negotiating dispute with respect to such change is pending before the Panel by the simple expediency of presenting its position to the Panel. To the contrary, Respondent, following the invocation of the Panel's services by the Union, was required to maintain the status quo as, clearly, Respondent's implementation was not "consistent with the necessary functioning of the Agency."

Second, Respondent asserts that its violation was de minimus because the eventual decision of the FSIP was that Respondent could do what it already had done. I do not agree. Maintenance of the status quo after the services of the FSIP have been invoked is not conditional and is not dependent on the FSIP ultimately agreeing with the position of the party which invoked the services of the FSIP. Rather, as succinctly stated by the Authority in the BATF, case, supra,

> ". . . by requiring the parties to maintain the status quo . . . after an impasse in negotiations has been reached and the services of the Panel have been invoked in a timely manner . . . the purposes and policies of the Statute will be effectuated by permitting the parties an opportunity to utilize the impasse resolution procedures of the Statute, thereby fostering stability in Federal labor-management relations . . ." (18 FLRA at 469)

Failure of an agency to maintain the status quo by unilaterally implementing a change while the matter implemented is pending before the FSIP, in the hope that the FSIP will agree with the Agency's position, is destructive of the very stability in Federal labor-management relations the Statute seeks to insure. Respondent violated §§ 16(a)(1), (5) and (6) of the Statute when it unilaterally implemented the change, General Services Administration, National Capital Region and American Federation of Government Employees, Local 2151, Case No. 3-CA-1991, Administrative Law Decision Report, No. 14 (September 16, 1982); Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, supra; see, also, Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA No. 95, 13 FLRA 571 (1984), and it is wholly immaterial as to that violation that the FSIP ultimately adopted Respondent's position, although, obviously, the fact that the FSIP ordered that the parties ". . . adopt the Employer's proposal", is both material and relevant as to the remedy, i.e., since the FSIP ordered that the parties adopt the Employer's proposal it would be wholly improper to order the change withdrawn.

Having found that Respondent violated §§ 16(a)(1), (5) and (6) of the Statute, I recommend that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in conditions of employment while negotiations over such provisions are pending before the Federal Service Impasses Panel.

(b) Failing or refusing to cooperate in impasse procedures as required by the Federal Service Labor-Management Relations Statute.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at Wright-Patterson Air Force Base copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such form, they shall be signed by the Commanding Officer, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region V, Federal Labor Relations Authority, Suite 1359-A, 175 West Jackson Boulevard, Chicago, Illinois 60604, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 16, 1985
Washington, D.C.

[5-CA-50337]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in conditions of employment while negotiations over such provisions are pending before the Federal Service Impasses Panel.

WE WILL NOT fail or refuse to cooperate in impasse procedures as required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 West Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, 4th INFANTRY
DIVISION FORT CARSON, COLORADO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1345

Charging Party

Case No. 7-CA-50286

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 8, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., February 24, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[7-CA-50286]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

HEADQUARTERS, 4th INFANTRY DIVISION
FORT CARSON, COLORADO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1345

Charging Party

Case No.: 7-CA-50286

Captain Donald R. Gitto, Esquire
For the Respondent

James J. Gonzales, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Seven, Federal Labor Relations Authority, Denver, Colorado against the Headquarters, 4th Infantry Division, Fort Carson, Colorado (Respondent), based on an amended charge filed by the American Federation of Government Employees, AFL-CIO, Local 1345 (Charging Party or Union). The complaint alleged that Respondent violated sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute).

The Complaint alleged, in substance, that Respondent, through its agent, Jose B. Mestas, on or about August 20, 1984, made statements to employee Marie E. Baller to the effect that Baller would be terminated for having sought the assistance of the Union and that Baller was in trouble for having sought the assistance of the Union. The Complaint also alleged that on or about August 27, 1984 Respondent issued a performance appraisal for the period ending August 19, 1984 in which Baller was rated as "not met" on a critical element of typing support and that this appraisal was issued in reprisal for Baller having sought the assistance of the Union. The Complaint also alleged that on or about September 14, 1984 Respondent terminated Baller during her probationary period from her position as Clerk-Typist, GS-322-03, in reprisal for having sought the assistance of the Union.

On June 19, 1985 Respondent filed an Answer which admitted that Mestas issued Baller a performance appraisal for the period ending August 19, 1984 in which Baller was rated as "not met" on a critical element of typing support, and that Respondent terminated Baller during her probationary period from her position as Clerk Typist on or about September 14, 1984. Respondent's Answer essentially denied the other allegations in the Complaint.

A hearing was held in Colorado Springs, Colorado. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The proposed findings have been adopted where found supported by the record as a whole. Based on the entire record,1/ including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Marie E. Baller was hired to work as a Clerk-Typist, GS-3, at the Exterior Work Section, commencing December 19, 1983. The hiring official was her first line supervisor, Mr. Jose B. Mestas. Mestas did not administer a typing test because the civilian personnel office had indicated that Baller was a qualified typist. Baller had certified that she could type 40 words per minute with only one error. The form she completed to certify her typing ability cautioned that "inability to perform as stated . . . may constitute a basis for termination during the probationary period of employment. . . ."

Mestas immediately learned that Baller was not a competent typist. She had problems with spacing and accurately completing blocks on forms. Material often had to be retyped three or four times. Consequently, Mestas limited her typing thereafter. Mestas attempted to get Baller enrolled in a typing course in order to bring her up to standards.

In January 1984, Baller contacted a union steward over Mestas' disapproval of annual leave. The steward contacted Mestas who later spoke with Baller about the phone call. According to Baller, Mestas was upset with her for going to the Union steward.

1/ The General Counsel's unopposed motion to correct the transcript is granted; the transcript is hereby corrected as set forth therein.

Mestas did not take any action to terminate Baller at this early date in her employment because he believed that he could motivate her and he relied on Baller's promises to take typing courses. Nevertheless, Mestas had to counsel her nearly weekly on her typing ability from approximately her first week of employment. Mestas made no memoranda or 7-B employee personnel file entries concerning such counselings. Mestas made numerous attempts to motivate Baller and often encouraged her to practice; however, Baller never followed through on her promises to do so. Mestas rated Baller satisfactory on her 90-day performance appraisal, but stated she should bring up her typing skills. Throughout Baller's employment, Mestas tried to help her because of her nationality. Both Mestas and Baller are Hispanic and were raised in southeastern New Mexico, in adjoining towns. This subject often arose in conversations between them.

In July 1984, Baller decided to apply for other jobs as a Clerk-Typist. As part of the application process, her supervisor, Mestas, completed a "Supervisory Appraisal of Demonstrated Performance." On the form, Mestas placed a check mark in box 2 (Satisfactory) for Baller's "skill in general office equipment." He discussed the rating with her and considered all aspects of her office work, not just her typing ability. Baller told him that she could do the job and that it included many non-typing duties. He did not study the accompanying vacancy announcement closely. Mestas gave Baller a satisfactory rating because he was trying to motivate her and believed that she could become a good employee. If he gave her a negative rating, she would likely become upset.

On July 19, 1984 Mr. Adron Floyd, the second line supervisor to Baller, informed Baller and a co-worker, Evelyn Kambouris, that he had to provide a GS-3 for a one-month detail at the work order desk. A third employee, Ms. Mason, was ruled out because she had recently been detailed to the work order desk. Floyd placed two slips of paper in a hat, one with the word "go," the other with the word "stay." Baller refused to pick a slip. Kambouris then drew the slip that said "stay". Baller became extremely upset and stated to Floyd that she would be on leave. Her acting supervisor indicated that none had been approved. Baller then stated that she would take sick leave. She reiterated that she would not go to the work order desk and, if forced to go, that she would not do a good job. She then requested permission to go to the personnel office and the Union. Floyd granted her permission. Baller was concerned about her potential performance on the detail since she had not received any training for this detail and had no experience in the area.

Mestas was on leave at this time. Upon his return from leave, Baller was working at the work order desk. She worked there from July 23, 1984 until August 17, 1984. She called Mestas requesting that he assist her in getting off of the detail. Mestas tried to calm her down and instructed her to do her best. Mestas later talked to Floyd about Baller being selected for the detail. Floyd explained everything that had occurred, including the fact that Baller had contacted the Union.

Sometime in early August while Baller was on detail at the work order desk (July 23 - August 17, 1984), but after Mestas had returned from vacation, Kambouris initiated a conversation with Mestas by asking how Baller was doing. Mestas told Kambouris that everything was all right with Baller until Baller went to EEO and went to the Union, that management does not like it when someone goes to the Union, and that management wants to settle their own problems.[2]

After Baller returned to the office from the detail, on or about August 20, 1984, Mestas spoke with her concerning her conduct over being detailed to the work order desk and going to the Union. Mestas said she was causing a lot of problems by going to the Union and should have kept this problem in-house among her supervisors "instead of going out-of-house."[3] "In house" and "out-of-house" were frequent phrases used in the shop because of reviews for contracting-out purposes. Baller had not heard the expressions and interpreted the work "outhouse" to mean that she was in "hot water" or "in trouble."

Around this time, a meeting was held which was attended by Baller, Mestas, Floyd, Antoinette Hawkins from personnel, and Bruce Stevens, a Union representative. At this meeting, Baller asked that she not be fired because she had just bought a home and could not afford to lose her job. Baller admitted that her typing was not up to par and stated that she needed help, but that she could not afford to take typing courses with her own money.

Shortly thereafter, Baller was due for her performance appraisal. Probationary employees must be given their performance appraisal between their eighth and ninth months of employment. As of August 19, 1984, Baller was employed eight months. Mestas made the decision to terminate Baller shortly after she returned from her detail. His work had piled up, and he needed help. He was under the mistaken impression that Baller had enrolled in a typing course, but when he learned that she still had not, he made the decision to terminate her because she could not type.

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[2] Mestas admitted that Kambouris had asked him how Baller was doing, but testified he did not remember the circumstances of that conversation. He acknowledged that there was a lot of kidding in the office and his words might have gotten twisted around. I credit Kambouris' testimony on this point. Respondent argues that Kambouris' performance became unsatisfactory when she began working for Mestas and, thus, had a motive for biased testimony against Mestas. Respondent failed to establish any adverse correlation between Kambouris' job performance and her credibility, and failed to establish that Kambouris had sufficient cause to bias her testimony on behalf of Baller.

[3] Mestas testified that he either learned from Baller, or knew, that she had gone to the Union, and told Baller, "We should have tried to keep this problem in-house first, easier. Solve the problems at the lowest level instead of going out-of-house." Based on the testimony of Mestas, Baller, and that of Kambouris as to Mestas' other statements, I find that Mestas' statement was essentially as set forth above, and that he did expressly equate Baller's "causing a lot of problems" with her contacting the Union for assistance.

On August 27, 1984, Baller was presented with her performance appraisal which rated her "NOT MET" in the critical element of typing support. Under "Actual Results Achieved," the performance appraisal states "Mrs. Baller's typing standards are not acceptable. Mrs. Baller was counseled at her 90-days evaluation and was requested to take a typing course. As of this date she has not."4/

Subsequently, Baller was issued a" Notice of Discharge During Probationary Period" by letter dated September 10, 1984. Baller's final day of work was September 14, 1984.5/

During the week of September 10, 1984, after Kambouris had returned from her detail to the work order desk, there was another brief conversation between Mestas and Kambouris in Mestas' office concerning Baller. Kambouris testified that Mestas initiated the discussion while they were alone. According to Kambouris, Mestas told Kambouris not to ". . . get any ideas, girl, about going to the Union. . . ," and stated that Baller caused waves, went to the Union, and went to EEO.6/

The original charge was filed by the Union on February 19, 1985.

4/ Baller testified on direct examination that when Mestas gave her the appraisal he "just told me he could not give me a met on these elements due to . . . typing standards that were not brought up." Later, on redirect examination, Baller testified that Mestas said, "Marie, I could have rated you better, but you went to the Union. And I'm just going to have to terminate you." Later, Baller appeared to recant; or was totally unable to recall what Mestas had said at this time. Under the circumstances, I do not credit Baller's testimony that Mestas said, "Marie, I could have rated you better, but you went to the Union. And I'm just going to have to terminate you."

5/ Baller was reemployed by Respondent on January 7, 1985 as a recreational aide, GS-3, Step 1, at the Ironhorse Physical Fitness Center.

6/ Mestas testified that he could not recall telling Kambouris not to get any ideas or not to cause any waves, and that he did not remember telling Kambouris that everything was okay until Baller went to the Union. Mestas testified that he did not think this happened because a trained supervisor does not say things like this and does not deny employees their rights. He acknowledged that there was a lot of kidding around and his words might have gotten twisted around. I credit Kambouris' testimony.

Discussion, Conclusions, and Recommendations

A determination of whether a statement violates Section 7116(a)(1) must take into consideration all of the circumstances surrounding the making of the statement. Department of the Treasury, United States Customs Service, 19 FLRA No. 114, 19 FLRA 956, 968 (1985). The standard by which one may determine interference, restraint or coercion, is not the subjective perceptions of the employee, nor is it the intent of the employer. Rather the test is whether, under the circumstances of the case, the employer's conduct may reasonably tend to coerce or intimidate the employee, or, in the case of a statement, whether the employee could reasonably have drawn a coercive inference from the statement. The effect of the employer's statements must be judged in light of circumstances in which words, innocent in and of themselves, may be understood as threats. Federal Mediation and Conciliation Service, 9 FLRA 199 (1982); Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA 290 (1983).

Under these criteria, Mestas' statement to Baller on or about August 20, 1984 that she was causing a lot of problems by going to the Union and should have kept the problem in-house instead of going out-of-house was coercive in nature and violated section 7116(a)(1) of the Statute.[7] An employee has the protected right to seek the assistance of the Union concerning employment complaints and to file and process a grievance under the collective bargaining agreement. Department of the Treasury, Internal Revenue Service, Louisville District, supra; Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA 766, 777 (1982). Mestas expressly associated Baller's going to the Union with her causing problems. Such a statement would reasonably indicate to an employee that the agency would deal with the employee and his complaint more sympathetically if the employee left the Union out of the picture. It is obvious that a subordinate would attach ominous overtones to such statement, and would think twice about exercising his right to seek Union assistance in the resolution of an employment problem. It would restrain an employee from seeking the Union's assistance in the resolution of a grievance because to do so would be harmful to the employee's interest.

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[7] Mestas' statement to Kambouris in early August (August 1-17), concerning everything being alright with Baller until Baller went to the Union, cannot be used to establish the allegations of paragraph 7(b) of the Complaint (that Respondent, through Mestas, made statements to the effect that Baller was in trouble for having sought the assistance of the Union), inasmuch as the statements were made more than six months before the filing of the charge with the Authority on February 19, 1985. See section 7118(a)(4). Mestas' statements to Kambouris both before and after August 20, 1984, however, can be used to establish Mestas' state of mind, motive, and propensity to make such statements.

Thus, it is concluded that the statement violated section 7116(a)(1) of the Statute. United States Customs Service, Region VIII, San Francisco, California, 18 FLRA No. 27, 18 FLRA 195, 208 (1985); Navy Resale System Field Support Office Commissary Store Group, 5 FLRA 311, 316 (1981); Department of the Treasury, Internal Revenue Service, Louisville District, supra.

Based on the credibility resolutions made above, I conclude that a preponderance of the evidence does not establish the allegations of paragraph 7(a) of the Complaint, i.e., that Respondent, through Mestas', made statements to Baller to the effect that Baller would be terminated for having sought the assistance of the Union.

With regard to the allegations of paragraphs 8 and 9 of the Complaint, i.e., that Baller was rated "not met" on a critical element in a performance appraisal and was terminated in reprisal for having sought the assistance of the Union, the General Counsel has the burden of establishing a prima facie case by showing that the employee was engaged in protected activity and that this activity was a motivating factor in the decision to take whatever discriminatory action was involved. Once the General Counsel meets its burden, Respondent has its chance to establish by a preponderance of the evidence that it would have reached the same conclusion even in the absence of union activity. Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981); U.S. Forces Korea/Eighth United States Army, 11 FLRA 434 (1983).

Baller's efforts to enlist the assistance of the Union is protected activity under the Statute, and her activity was known to the Respondent. However, in making the above findings, I have credited Respondent's explanation for Baller's appraisal and for her termination and cannot conclude that her protected activity was a motivating factor. The evidence amply establishes that Baller could not perform the critical element of her job -- typing. The evidence also establishes that Baller was terminated during the probationary period because of her inability to type. The timing of Baller's termination is suspicious inasmuch as it coincided somewhat with her going to the Union for assistance and Mestas' violative statement that she was causing problems thereby. With respect to timing, the record establishes that her probationary performance appraisal was due, and time was running out in which to terminate her for performance during her probationary period. The timing was actually based upon regulatory guidelines for termination of unqualified probationary employees. I cannot accept the General Counsel's argument that Respondent, through Mestas, would have continued to tolerate Baller's typing, in view of her overall record, had not Baller gone to the Union on Floyd. While Mestas may have been irritated by Baller's "causing problems," it is noted that Mestas did not seek Baller's termination some seven months earlier in January when she first contacted the Union concerning Mestas' own actions, and when he was also upset at her going to the Union. There is no evidence that the fact that Baller went to the Union several months later over the work order desk detail initiated by Floyd was in any respect a threat to

Mestas, or that Floyd encouraged Mestas to retaliate against Baller. Even if Respondent were in some part motivated by union considerations, the Respondent has shown by a preponderance of the evidence that Baller's inability to meet a critical element of her job would alone have led to her termination. Suggestions made during the period as to how she could improve went unheeded, and the hope that she would improve was blighted. See Internal Revenue Service, Washington, D.C., supra; Veterans Administration, White River Junction, Vermont, 6 FLRA 381 (1981).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Headquarters, 4th Infantry Division, Fort Carson, Colorado shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing, by implied threats or other means, any employee from seeking the assistance of the American Federation of Government Employees, AFL-CIO, Local 1345, the employees' exclusive representative, concerning any complaint relating to the employment of the employee and from filing and processing grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 C.F.R. Section 2423.30 notify the Regional Director, Region Seven, Federal Labor Relations Authority, Denver, Colorado, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the remaining allegations in the Complaint be, and they hereby are, DISMISSED.

Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: January 8, 1986
Washington, D.C.

[7-CA-50286]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce, by implied threats or other means, any employee from seeking the assistance of the American Federation of Government Employees, AFL-CIO, Local 1345, the employees' exclusive representative, concerning any complaint relating to the employment of the employee and from filing and processing grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Commanding Officer)

Dated: ______________________ By: _______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region Seven, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

-3-57

Federal Labor Relations Authority

Washington, D.C. 20424

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

NUMBER 57

March 14, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 8-CA-50093 (March 4, 1986)

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO

Case No. 9-CA-50343 (March 4, 1986)

Department of the Navy, Naval Weapons Station Concord, Concord California and American Federation of Government Employees, Local 1931, AFL-CIO

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y3.F 31/21-3:

[8-CA-50093]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE, MARYLAND

Respondent

and

Case No. 8-CA-50093

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 23, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., March 4, 1986

Harold D. Kessler
Harold D. Kessler
Director of Case Management

[8-CA-50093]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Case No. 8-CA-50093

Jay Clary, Esquire
For the Respondent

Jonathan S. Levine, Esquire
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judges

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq. (herein called the Statute). It was instituted by the Regional Director of Region 8 based upon an unfair labor practice charge filed on December 7, 1984, by the American Federation of Government Employees, AFL-CIO (herein called the Union), against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (herein called the Respondent). The Complaint alleged that Respondent violated section 7116(a)(1) and (5) of the Statute by issuing a memorandum changing the tardiness and leave policy in its Los Angeles Office of Hearings and Appeals (herein called LAOHA) without first notifying the Union and affording it an opportunity to bargain over the change and/or its impact and implementation.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Los Angeles, California at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the Respondent and the General Counsel and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

Sometime around October 30, 1984, Respondent's LAOHA employees received a memorandum from office manager Lee Rodriguez concerning the subject of tardiness. The memorandum stated, in pertinent part:

> "There is no grace period! You are to be at your desk and working at the time your tour of duty begins. You are tardy when you are not at your desk when your normal tour of duty begins."

Prior to October 30, 1984, Respondent's LAOHA had no policy whereby employees had to be at their desks at the start of their tour of duty in order not to be considered tardy. The record reveals that prior to the issuance of this memorandum, employees were not considered tardy if they were either "ready to work" at their desks, or at their work station when the tour began. Furthermore, Respondent's witness, supervisor Greenspan was unable to articulate any tardiness policy prior to the issuance of the October 30 memorandum which required employees to be at their desks at the beginning of their normal tour of duty to avoid being tardy. Respondent's witness Administrative Law Judge McLaughlin was also unable to confirm that the tardiness policy prior to October 30 required employees to be at their desks at the beginning of the tour of duty. Based on the obscure testimony of these witnesses it is found that no policy requiring employees to be at their desks at the beginning of the tour of duty existed prior to October 30, 1984 in the LAOHA and that the memorandum issued by Office Manager Rodriguez constituted a change in the previous tardiness and leave policy in the LAOHA.

The tardiness policy prior to October 30, 1984 as disclosed by the record was that employees were considered to have reported to work on time and were not adjudged to be tardy if they had signed in to work by the start of their shift. Thus, prior to October 30, 1984 employees signed in and were apparently allowed to perform other non-work functions such as making coffee and going to the bathroom prior to beginning work. It is reasonable to assume that such non-work functions prompted the issuance of the October 30, 1984 memorandum.[1]

At the time of the hearing, the net impact of the change was that one employee had been penalized 15 minutes leave for one tardiness. One foreseeable impact of course, is that other employees could be charged leave based on this change when they are not at their desks at the start of their tour of duty. Other impact includes, of course, requiring employees to report to work prior to their actual starting time in order to be at their desks. It is uncontroverted on this record that some employees would have to report to work at least "5 minutes" early in order to comply with the new policy. Such a requirement carries with it the obligation to pay these employees for the time they are required to report early. In taking judicial notice of "some of the things that go on in a Social Security Area Office," I note that all of the work that goes on does not begin at an employee's desk. As the record reveals, some employees may be required to be setting up a hearing room or be on other job related errands away from their desks when their tour began. A broad rule, requiring everyone to be at their desk at the start of work clearly involves matters about which bargaining could take place. I therefore, find that the change carries with it an impact, the substantive adverse effect of which must be examined based on current Authority law.

Discussion and Conclusions

The record is clear that prior to October 30, 1984, employees at Respondent's LAOHA were considered on time to work if they had signed in to work by the start of their shifts. Thus, the record discloses that employees could sign in to work on time, but not be at their desks and still be considered on time to work. The October 30, 1984 memorandum was a change in that policy in that it required employees to be at their desks at the start of their tour of duty or be considered tardy.

The General Counsel insists that this was a change in a condition of employment without providing the employees' exclusive representative with advance notice of the change and allowing it an opportunity to negotiate concerning the proposed change and/or the impact and implementation.

---

[1] Respondent requests that judicial notice be taken of the personnel guide for supervisors and the negotiated agreement. In so doing, I note that neither the SSA-TS-No. g. 367 nor the negotiated agreement addresses the situation in this case. Thus, neither makes mention of an employee being required to be at his or her desk at the start of a tour of duty, which is precisely the issue herein. I hereby find that the cited portions of those documents are immaterial to this matter.

Respondent argues that it had no obligation to negotiation since it was exercising a management right under section 7106 of the Statute. Furthermore, Respondent contends that the change was no more than de minimis since it resulted in an "insubstantial impact on bargaining unit employees."

I disagree with Respondent. First, as the General Counsel maintains, the requirement that those bargaining unit employees be at their desks at the start of their tour of duty is negotiable as to substance and not as Respondent asserts a management right. The Authority has already held that management policies regarding the recording of employee time and attendance is a condition of employment. See, American Federation of Government Employees, AFL-CIO, Local 1603, 16 FLRA 96 (1984); See also, Planners, Estimators, and Progressmen Association, Local No. 8, 13 FLRA 455 (1983) (Finding Union proposal which would allow unit employees to manually record their time and attendance instead of mechanically through use of a time clock relates to a condition of employment not involving matters negotiable only at agency's election under section 7106(b)(1) of the Statute); Department of the Treasury, U.S. Customs Service and U.S. Customs Service, Region IX, Chicago, Illinois, 17 FLRA 221 (1985), and cases cited therein, (Decision to change starting and quitting times subject to duty to bargain unless demonstrated that such a change directly or integrally related to numbers, types or grade of employees or positions assigned to a work project or tour of duty so as to be determinative of such numbers, types or grades and therefore negotiable solely at the election of the Agency under section 7106(b)(1) of the Statute); See also, Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475 (1984) (Unilateral change in sick leave call in procedures violated section 7116(a)(1) and (5)). The above cases make it sufficiently clear that the subject of leave is negotiable. Therefore, it is found that Respondent was not, as it contends exercising a management right under section 7106(a)(2) of the Statute when it required employees to be at their desks at the start of their tour of duty or be required to take leave. Moreover, such a change which requires employees to report to work at an earlier time constitutes a change in the starting time of those employees and is clearly negotiable.

Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA 922 (1984) cited by Respondent, is inapposite since it deals with changes exercised pursuant to management rights resulting in an impact or reasonably foreseeable impact on bargaining unit employees which were no more than de minimis. Similarily, recent cases such as, Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA 827 (1985), all involved the exercise of a management right, thereby, requiring a determination of the degree of impact. Since it has already been determined that the change herein does not involve a management right, it is found that a determination of whether the instant change was more than de minimis is unnecessary.

The change in this case is one ripe for bargaining. Respondent in essence contends that the only effect of the change was to bring employees in the LAOHA into compliance with Social Security Regulations and contractual obligations. However, nowhere has it shown that those regulations or the contract required employees to be at their desk at the beginning of a tour of duty or be considered tardy. A considerable argument can be made that this is the sort of question that "collective bargaining is intended to resolve." Federal Employees Metal Trades Council, AFL-CIO v. Federal Labor Relations Authority, Slip Op. No. 85-7050, 9th Cir., December 20, 1985. Here Respondent LAOHA has an interest in seeing that its employees are punctual in reporting to work. On the other hand, it is clear that the employees were required to report to work prior to their actual starting time in order to be at their desks on time, thereby lengthening their day. Thus, there is more involved in this case than whether one or two employees are late to work and how that tardiness would be handled. It is uncontroverted that the policy would require some employees to report to work 5 minutes prior to their actual starting time leaving the question of whether they should be paid for that 5 minutes since they are being charged leave for tardiness beginning after 5 minutes. Such a question undoubtably involves a condition of employment requiring bargaining. Under all the circumstances, it is found that the change in this matter involved a negotiable subject of bargaining and that the Respondent's failure to give notice and an opportunity to the exclusive representative to bargain on the matter constituted a violation of section 7116(a)(1), and (5) of the Statute.

In agreement with the General Counsel it is also found that a status quo ante remedy is appropriate in this case in order to effectuate the purposes and policies of the Statute.

Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland shall:

1. Cease and desist from:

    (a) Unilaterally instituting changes in the tardiness and leave policy without first notifying the American Federation of Government Employees, AFL-CIO, Council 215, the exclusive representative of certain of our employees, and affording it the opportunity to bargain concerning such changes and/or impact and implementation of the change.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Rescind the October 30, 1984, Memorandum which unilaterally implemented a new policy for tardiness and leave wherein employees are required to be at their desks and working at the time their tours of duty begin and restore the policy that previously existed prior to October 30, 1984.

(b) Notify the American Federation of Government Employees, AFL-CIO, Council 215, in advance of any intended changes in the tardiness and leave policy and, upon request, negotiate with the exclusive representative concerning such proposed changes.

(c) Post at its Los Angeles, California, Office of Hearings and Appeals facility copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Administrative Law Judge In Charge, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 8, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash Jr.

ELI NASH, JR.
Administrative Law Judge

Date: January 23, 1986
Washington, D.C.

[8-CA-50093]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally institute changes in the tardiness and leave policy without first notifying the American Federation of Government Employees, AFL-CIO, Council 215, the exclusive representative of certain of our employees, and affording it the opportunity to bargain concerning such changes and/or the impact and implementation of the change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the October 30, 1984, Memorandum which unilaterally implemented a new policy for tardiness and leave wherein employees are required to be at their desks and working at the time their tours of duty begin and restore the policy that previously existed prior to October 30, 1984.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Council 215, in advance of any intended changes in the tardiness and leave policy and, upon request, negotiate with the Union concerning such proposed changes.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 and whose telephone number is: (213) 688-3805.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION CONCORD
CONCORD, CALIFORNIA

Respondent

and

Case No. 9-CA-50343

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1931, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued her Decision and Order in the above-entitled proceeding on January 22, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., March 4, 1986

Harold D. Kessler
Harold D. Kessler
Director of Case Management

[9-CA-50343]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION CONCORD
CONCORD, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1931, AFL-CIO

Charging Party

Case No. 9-CA-50343

Gilbert Merrill,
For the Respondent

Stefanie Arthur,
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to charges of unfair labor practices filed on July 1 and September 17, 1985 by the Charging Party, the Regional Director of Region IX, Federal Labor Relations Authority (hereinafter, the Authority) investigated and, on September 26, 1985, filed the complaint initiating this proceeding. The first charge was signed on June 27, 1985 by the 1st Vice President of Local 1931.

The complaint alleges certain coercive and discriminatory acts by Respondent, in violation of Sections 7116(a)(1) and (2) of the Statute, and a failure to bargain in good faith by making a unilateral change in the working conditions of employees, in violation of Sections 7116(a)(1) and (5) of the Statute.[1]

Respondent denies that the alleged violations occurred.

A hearing was held on November 26, 1985, in San Francisco, California. The parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed by the General Counsel and Respondent on January 10, 1986. Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

Findings of Fact[2]

1. At all times material herein, Respondent or CNWS, has been, and is, an agency within the meaning of Section 7103(a)(3) of the Statute.

---

[1] Section 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; . . . [or]
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter. . . .

[2] The following abbreviations will be used herein. "TR." refers to the transcript. "G.C. Exh." refers to the exhibits of the General Counsel and "R. Exh." to those of Respondent. "Jt. Exh." refers to Joint Exhibit Number 1." "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that of Respondent.

Corrections to the transcript are attached hereto and are made pursuant to 5 CFR 2423.19(r) and the unopposed motion of the General Counsel, which is granted.

2. At all times material herein, the Charging Party or Union has been, and is, a labor organization within the meaning of Section 7103(a)(4) of the Statute. Local 1931 is composed of three separate units. Roughly 600 employees are in the unit representing Wage Grade employees, including drivers in the Motor Pool of the Transportation Division.

3. At all times material herein, the following named persons occupied the positions set forth opposite their respective names, and are now, and have been supervisors and/or management officials of Respondent within the meaning of Section 7103(a)(10) and/or (11) of the Statute, respectively, and have been agents of Respondent:

Wilbert Scott --- Motor Vehicle Operator Foreman;

Ferris Caldwell --- Motor Vehicle Operations Branch Foreman; and

Eugene Piazza --- Director, Transportation Division.

4. Donald Carroll has been an employee of Respondent in its Motor Pool for almost five years. Mr. Carroll is currently employed as a Motor Vehicle Operator, WG-8. Mr. Carroll is also the Union's Chief Steward, a position he has occupied for about a year. As Chief Steward, Mr. Carroll is entitled by the parties' collective bargaining agreement to use two and a half hours of official time each day. However, Mr. Carroll generally only uses two hours each day, from 1:30-3:30 p.m.

5. The Motor Pool has a day shift which operates from 7:00 a.m. to 3:30 p.m. and a swing or night shift commencing at 1:30 p.m. In June 1985, there were approximately 25 Motor Vehicle Operators (MVOs) in the Motor Pool, including five WG-5 and WG-7 drivers; four WG-8 drivers in the mule barn (dispatching forklifts); two WG-8 fuel drivers; and two WG-8 utility drivers on swing shift. The remaining 12 MVOs are WG-8s, performing essentially the same work and referred to collectively as the "pool" drivers. Mr. Carroll is one of the "pool" drivers. Basically, their job is to haul explosives and inert material on and off CNWS. Each day, each of the pool drivers receives his daily assignment from the dispatcher. There are certain assignments which regularly occur and which are rotated among the drivers, including the "bus" run in which military and civilian personnel are transported to and from the docks and the dunnage runs. Other jobs, such as moving vans on station, or picking up material from off station, occur periodically and are assigned on a daily basis to the MVOs to perform. The drivers use a tractor and trailer to perform their work and each of the WG-8 pool drivers has been permanently assigned a tractor for his regular use. The driver is expected to insure that his tractor is properly maintained, including any necessary repairs and servicing. Each driver will use his own tractor for all of his assignments, unless it is in the shop, or unless he is specifically assigned another piece of equipment for his work that day.

6. For many years prior to the events which are the subject of the unfair labor practice charges here at issue, Motor Pool supervision utilized a seniority system for permanent assignment of tractors. In this system, the drivers in the pool were ranked in order of seniority based on service computation date. When a new tractor came into the Motor Pool, the drivers who so wished could "bid" on the tractor and it would be assigned by the supervisor to the most senior driver who desired the vehicle (TR. 28). Similarly, when a driver retired or changed to a position where tractors were not permanently assigned his tractor would be available for assignment based on seniority rank.[3] The evidence established that sometimes employees low in the seniority ranking obtained new tractors because other more senior drivers did not wish to change vehicles.[4] Each tractor, just like an automobile, has different features, equipment, and capabilities so that the selection of a tractor is largely a matter of personal preference. For example, "Old Yellow," the 1979 White cab-over tractor, which is the subject of this case, has air conditioning, an air-ride seat, and a radio which make it very desirable to some drivers, whereas its air-assisted clutch makes it undesirable to others.

7. Although it is undisputed that different tractors do have different capabilities, e.g., certain tractors can pull more weight than other tractors, there was no evidence to show that management has made any distinction between tractors based on capabilities for purposes of permanent assignment of tractors. Moreover, when a work assignment requires a different vehicle (e.g. the heavy loads which are picked up at Lemoore or Sacramento are more efficiently carried with the three-axle tractor), a driver has been assigned the required vehicle to do the job notwithstanding the permanent assignment of vehicles. Normally, there is no distinction made between tractors in the daily assignment of work. See, generally, TR. 137-145.

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[3] Wilbert Scott's testimony that only drivers whose vehicles were older than that of the retiree could "bid" on the newly released truck appears to be more a statement of what generally occurred than a statement as to the system, i.e., those with newer trucks generally did not desire an older truck. In any event, Mr. Carroll testified without contradiction that he did trade his 1983 International two-axle for a 1979 conventional GMC three-axle in 1984; and another driver, Randy Hammond, confirmed that the system applied to both old and new vehicles without any apparent distinction.

[4] Wilbert Scott's testimony in this regard was contradictory and is rejected in the face of both Mr. Carroll's and Mr. Hammond's unrefuted testimony as to their own experiences in obtaining new vehicles while fairly low in seniority.

8. In March of 1985, MVO Freddy Neher retired and his tractor, "Old Yellow," became available. At that time, Claude Ray was the most senior of the pool drivers followed by Donald Carroll. Mr. Carroll, who was interested in driving "Old Yellow" and knew that Mr. Ray was not, had earlier expressed his desire to supervisor Cullen Warren to have it assigned to him after Mr. Neher retired. On March 15, when Mr. Neher retired, Mr. Carroll again spoke to Mr. Warren, specifically requesting the assignment. Mr. Warren indicated that he would first check with Mr. Ray; but before anything further could be done, on March 16, Mr. Carroll was injured and was thereafter off the job for 83 days.

9. When Mr. Carroll returned to work on June 11, he asked the day shift dispatcher whether "Old Yellow" had been assigned to anyone; and when told that it had not been, he went to see Mr. Warren to ask to have it assigned to him. Mr. Warren told Mr. Carroll that since Wilbert Scott was going to replace him as supervisor when he retired on July 3, he was leaving the assignment of vehicles to Mr. Scott.[5]

a. According to the testimony of Mr. Carroll, the following then took place. Mr. Carroll went into Mr. Scott's office to ask for "Old Yellow." Mr. Scott replied that:

> he was not going to assign it to me; that he was going to assign it to whoever he felt deserved it. He also stated that I was not on the job enough; I was only on the job half a day, so, therefore, I did not deserve it.

See TR. 39. Mr. Carroll replied that:

> [he] was in the job five hours a day, so, therefore, with [his] seniority, the vehicle should be assigned to [him].

See TR. 39. Mr. Scott replied:

> No, Carroll, you are only on the job for two hours a day, so we are going to assign it, I am going to assign it to whoever is on the job eight hours a day as driver.

See TR. 39. Mr. Carroll then stated that he would talk to Mr. Caldwell (Mr. Scott's supervisor) about it; and the conversation then ended. At no time during this conversation, did Wilbert Scott tell Mr. Carroll that he had already assigned the vehicle to someone else. Nor did he tell Mr. Carroll that he was changing the seniority system and that he had already spoken to the Union about it.

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[5] Wilbert Scott testified that he had assigned "Old Yellow" to driver Steve Adams while Mr. Carroll was off work but when he got "feedback" that Mr. Carroll was "upset" because he was not given "Old Yellow," he pulled the vehicle back from Mr. Adams (Tr. 94).

b. Wilbert Scott denied that Mr. Carroll ever approached him "per se" about the assignment of "Old Yellow" (TR. 100).

c. Mr. Carroll impressed me as an honest witness with a firm recollection of the events at issue. As to whether Mr. Scott had this and other conversations with Mr. Carroll, I find that Mr. Scott was less than candid and appeared evasive, although I do credit his testimony as to conversations he had with the Union's President, as found later in this decision. Accordingly, I find that the conversation set forth in finding 9a took place as testified to by Mr. Carroll.

10a. Mr. Carroll testified that, on June 12, 1985, he went to see Mr. Caldwell about the matter and told him that Mr. Scott was not assigning "Old Yellow" to him because of his union activities; that Mr. Caldwell denied this and said it was because he was "only on the job half a day" (TR. 40); that when Mr. Carroll stated, in reply, that he was on the job five hours a day, Mr. Caldwell stated that he was "under the impression from Mr. Scott that [Mr. Carroll was] only on the job two hours a day" (TR. 41); and that Mr. Caldwell then stated that he was going to go along with the Scott decision "because of the amount of time [Mr. Carroll] spent on the job" (TR. 41). Mr. Carroll then indicated that he would speak to Mr. Piazza about it; and the meeting ended. Mr. Carroll went immediately to see Mr. Piazza's secretary and made an appointment to see Mr. Piazza on June 17.

b. Mr. Caldwell testified that Mr. Carroll did come to him to say that "he wanted that tractor, that yellow tractor" (TR. 200) and that he told Mr. Carroll that he "would have to back Mr. Scott" (TR. 201). Mr. Caldwell denied that, at this meeting, any reference was made to Mr. Carroll's "involvement with the union" or that he said to Mr. Carroll that he "was off the job too much because of his union activities" (TR. 201). But he then admitted, that:

> It could have come up in one of our off-the-record conversation that we were always doing to each other, but nothing official.

See TR. 201-202.

c. Mr. Carroll appeared to have a better recollection of the June 12 meeting than Mr. Caldwell. Accordingly, I credit his testimony as set forth in finding 10a.

11a. Mr. Carroll testified that, on June 13, 1985, Mr. Scott met him at a worksite (E-85) and stated to him that he:

> was going to have to give up [his] good equipment [he] had assigned to [him] because of the amount of time [he] spent on union activities; or, [he] was going to have to give up [his] union activities and union time in order to keep the good equipment.

See TR. 44. Mr. Carroll testified that he replied that all the equipment had been assigned on a seniority basis and should be maintained that way. (The equipment then assigned to Mr. Carroll included a tractor and a flatbed trailer.) Mr. Carroll testified that Mr. Scott said that "there was not going to be any discussion about it" (TR. 44). Mr. Carroll testified that when he got off work that day he went to the union office and made a note of this conversation. See TR. 227 and G.C. Exh. 8. Mr. Carroll testified that Mr. Scott made no reference to a change in the seniority system.

b. Mr. Scott testified that he talked to Mr. Carroll quite a few times down at E-85, but could not recollect dates. He testified that he never told Mr. Carroll that he should give up the equipment assigned to him or his daily union time, or that the good equipment should be given t somebody who works eight hours a day on the job assigned to him as a driver. See TR. 190-191. Mr. Scott testified that Mr. Carroll did indicate to him that he was not on the job enough to warrant the assignment of a trailer; that he did not want the trailer because of the fact that other drivers were "taking stuff out of his trailer, and he could not keep his trailer up" (TR. 195); and that he voluntarily gave up the trailer.

c. Again, I credit the version given by Mr. Carroll of this July 13 conversation, as set forth in finding 11a, and for the same reasons expressed in finding 9c.

12a. On June 17, 1985, Mr. Carroll kept his appointment with Mr. Piazza. According to Mr. Carroll, the following took place at the meeting. He told Mr. Piazza that Mr. Scott and Mr. Caldwell were not going to assign "Old Yellow" to him and were going to take his equipment away from him "because of [his] union activities" (TR. 45). Mr. Piazza said that "he did not believe it was because of the union activities, but he would have to check with Mr. Scott and Mr. Caldwell as to the reason why" (TR. 45). On June 27, having heard nothing further, Mr. Carroll wen again to see Mr. Piazza about the matter and asked whether Mr. Piazza was going to assign "Old Yellow" to him. Mr. Piazza said "[n]o" and that he was "going to have to go along with Caldwell and Scott on it" (TR 45). Mr. Carroll replied: "That's fine" (TR. 45); and he did not ask him "why (TR. 46).

b. According to Mr. Piazza, Mr. Carroll "came in and brought out his side of the story [about the "Old Yellow" assignment];" whereupon Mr. Piazza told him he "would look into it and talk to [Mr. Piazza's] foreman and [he] would get back to [Mr. Carroll]" (TR. 205). Mr. Piazza recalled that Mr. Carroll, when he first talked to him about "Old Yellow":

> was a little bit bent out of shape and he says he came back from, I think he came back from leave, a traumatic injury, and disability leave, and found that "Old Yellow," his truck, had been given to one of the other drivers. And he says, he was the senior man and he wanted it. And he said that that has been the policy and wanted me to look into it.

See TR. 210. Mr. Piazza testified, on cross-examination, that Mr. Carroll "may" have made a statement to him "that Mr. Scott was claiming that he was off the job half the day" (TR. 210-211). Mr. Piazza definitely recalled that Mr. Carroll said to him "it wasn't true that he was off the job half the day" and that he would "give you five and a half hours a day" (TR. 211). Mr. Piazza admits that Mr. Carroll "may" have said that "Mr. Scott wasn't going to assign him 'Old Yellow' because of the amount, because he was only on the job half a day" (TR. 211). Mr. Piazza admits saying to Mr. Carroll something along the line that Mr. Carroll had a job to do and he has a union contract giving him two and a half hours to use. See TR. 212. Mr. Piazza testified that he did check with his foreman; learned that Mr. Scott had changed the seniority system; and subsequently told Mr. Carroll that he was supporting the decision of his managers. Mr. Piazza denies telling Mr. Carroll that "it wasn't because of his union time that he wasn't being assigned ['Old Yellow']" (TR. 213-214).

c. Mr. Piazza does not really dispute much of the testimony of Mr. Carroll. Both seemed to be honest and candid in giving their recollections of what transpired at their meetings. I find that Mr. Carroll had a better recollection than Mr. Piazza, however, and I accordingly credit his version, as set forth in finding 12a.

13. On July 9, 1985, a regularly-scheduled safety meeting of the MVOs took place; and safety topics were discussed.

a. According to Mr. Carroll, during this meeting, Mr. Scott told the drivers that:

> he was assigning "Old Yellow" to Steve Adams, and that the seniority was no longer going to be in effect for assignment of vehicles.

See TR. 47. According to Mr. Carroll the drivers started "grumbling and moaning about it because the system was being changed" (TR. 47). According to Mr. Carroll, Mr. Scott told the drivers that:

> they could go to the union about it, if they did not like [sic]; and that there was nothing they could do about it.

See TR. 47. According to Mr. Carroll, Mr. Scott told the drivers that:

> he was going to assign the vehicles to whomever he felt like.

See TR. 48. According to Mr. Carroll, Mr. Scott did not say that he had already talked to the union about making this change.

b. Randy Lee Hammond, another Wage Grade 8 driver in the Motor Pool, also testified as what took place at the July 9 safety meetings, as follows:

> we had Scott presenting the safety meeting. He came across saying that we will drop the seniority system and he will assign the vehicles as he saw fit. Well, he said he would assign the tractor to Steve Adams. Well, when he said that, Don Carroll stepped on him and said, "Don't make that too official, because I thought we based this all on that seniority."
>
> He said, "Well, the seniority is out; I am going to assign the vehicles the way I want it. That is the way it is going to be.

See TR. 64. Mr. Hammond also testified that Mr. Scott said that:

> Don Carroll could go to the union, but I don't think that would help him much.

See TR. 65.

c. Mr. Scott testified as follows to the July 9 safety meeting:

> We were having a safety meeting one morning, and I was just speaking and talking in general. And Mr. Carroll said, "Oh, and by the way [he was talking to the other driver.] don't get used to that truck because that's my truck. And it is in litigation right now.
>
> I told Mr. Carroll that he did not bring up anything about trucks. As far as we were concerned, I was the supervisor; I assigned the trucks. And, if it was in litigation, then, we will let litigation take care of it. But right now, that wasn't part of the problem.

See TR. 100. Mr. Scott testified that he "didn't mention assigning 'Old Yellow' at the meeting; it was brought up" (TR. 157). He conceded that i was "a possibility" that at a meeting he told the employees that Steve

Adams was going to be assigned "Old Yellow." See TR. 157. He conceded that at a meeting he "brought the seniority system up [but] never brought it up being in or out" (TR. 157).

d. As to the three versions given of the July 9 safety meeting, I credit that given by Mr. Hammond, as set forth in finding 13b, above. He sounded positive, in his recollection of the event, and impressed me as a credible witness and the least self-interested one of the three.

14. Mr. Scott was never happy about the seniority system for assigning equipment; and he had discussed how he felt the system was "unfair" with James Lee Wright (now President of Local 1931) and others, before ever becoming a supervisor. See TR. 87.

15a. After becoming a supervisor, Mr. Scott testified that he discussed the matter again with Mr. Wright, around March 1984. Mr. Wright, according to Mr. Scott, replied that there was "[n]o problem; don't worry about it and don't sweat it" (TR. 87). Mr. Scott testified that, on two occasions in May 1985, he and his supervisor, Mr. Caldwell, discussed the matter with Mr. Wright and that Mr. Wright again assured him that it was "no problem, forget it" (TR. 90). Mr. Scott testified that he told Mr. Wright the kind of system he wanted to put into place and that Mr. Wright replied that there was "no problem with it" and to "[g]o ahead and take care of it" (TR. 90) and that he would "talk to Carroll about it" (TR. 107). This occurred in the latter part of May 1985.

b. Mr. Caldwell also testified to having two meetings with Mr. Scott and Mr. Wright about changing the seniority system. He recalled that, at the first meeting, Mr. Wright said "he would get back to us" (TR. 199) and, at the second, that he said something like:

> I am the president of the union; don't worry about it.
> I will take care of it.

See TR. 199.

c. Mr. Piazza testified that he discussed, with Mr. Wright, the matter of Mr. Carroll's unhappiness about not being assigned a particular piece of equipment to which he would be entitled under the old seniority system. This conversation took place shortly after Mr. Piazza met, on June 17, 1985, with Mr. Carroll. Mr. Piazza testified that he told Mr. Wright that he understood that Mr. Carroll was going to file a grievance or an unfair labor practice; that he did not think this was "right;" and that Mr. Wright replied: "Don't worry; we will take care of it" (TR. 206).

d. Mr. Wright testified that he did not receive any notice from management of intent to change the system of assigning tractors by seniority in the motor pool. See TR. 76. He is the union official designated to receive notice of changes. He testified that the usual practice is to receive written notice through the Respondent's internal mail system. On those occasions when notice is received by telephone, Mr. Wright testified that he always requested that a written notice follow up the telephone notice. He testified that notices of changes are usually received from the labor relations office and some from division heads, and that he could not recall ever receiving notice of a change from a first-line supervisor. Examples of written notices were introduced into evidence. None were from the Labor Relations Office.

e. It is undisputed that both Mr. Scott and Mr. Caldwell were former union stewards and had an informal and good working relationship with Local 1931. It is undisputed that the division head of the Motor Pool has not made a practice of giving the union written notice of changes. See TR. 207 and see also TR. 92. Although the General Counsel adduced evidence of written notices given to the Union by other division heads (G.C. Exh. 4-7), none were adduced from the Transportation Division.

f. Based upon the testimony of the management officials as set forth in findings 11a, b and c, I find that, by the latter part of May 1985, management had given Local 1931 notice of its intent to change the seniority system for assigning equipment in the Motor Pool; that the President of Local 1931 voiced no desire to negotiate the matter; and that he indicated to management that he concurred in the changes. I find that Mr. Wright, who testified to the contrary, appeared to be uncomfortable as a witness. Although his duties as President include the processing of unfair labor practices (TR. 75), for unexplained reasons he did not sign the charges initiating this proceeding. In view of the basically consistent and credible testimony of three management officials disputing that of Mr. Wright, his own demeanor on the witness stand, and his failure to sign the unfair labor practice charges, I find that Mr. Wright was too embarrassed to tell the truth about this matter; that he had been given notice of the change while his Chief Steward was in a protracted leave status; and that what he perceived of as "no problem" as to the change turned out to be a "problem" for his Chief Steward. The General Counsel stresses that not one of the management officials told Mr. Carroll about the changed seniority system when he requested "Old Yellow." See G.C. Br. 9, fn. 13. However, these officials may well have felt that it was up to the Union President to inform his Chief Steward of the commitment he had made to management during the Chief Steward's absence.

16a. Mr. Scott's new method of assigning tractors, as of June 1985, was to place the drivers into Group A or B. Group A drivers have fairly new tractors; and the seniority system would not apply to them as tractors came up for assignment. Group B drivers had older tractors with seats which caused back problems. The Group B drivers would be eligible, by seniority, to bid on newly-available tractors.

17. Since June 1984 Mr. Carroll has been driving a 1979 conventional GMC, three-axle, 10-wheel tractor, capable of performing any special jobs which may come up. Mr. Carroll's vehicle is considered "fairly new" and does not cause a back problem (TR. 105-106). Therefore, he is considered

by Mr. Scott to be in Group A and ineligible, under the changed system, for a reassignment. See TR. 105-106 and 154. Mr. Carroll gave up a 1983 tractor because the 1979 one had three axles, rode easier, drove better with easier shifting, and was easy to get in and out of.

18. In June 1985, Mr. Carroll was the only union representative and user of official time in the Motor Pool. Management does not interfere with his use of official time, and gives him his fair share of overtime work.

19. Mr. Scott expressed some degree of annoyance that Mr. Carroll's union duties interfered with his ability to assign work to him and suggested that Mr. Carroll was actually working less time than shown on the trip tickets he turned into the dispatcher. See TR. 129-132, 135-136, 139 and 145.

Discussion and Conclusions

I. The General Counsel has established, by the preponderance of the evidence,[6] that a management official made remarks to a chief steward and bargaining unit employees which violated Section 7116(a)(1) of the Statute.

It is well settled that an agency may not interfere with, restrain or coerce an employee in the exercise of rights assured by the Statute, including the right to act as a representative of the exclusive representative, without violating the Statute. The standard by which one may determine interference is not the subjective perceptions of the employee, nor is it the intent of the employer. Rather, the test is whether, under the circumstances of the case, the employer's conduct may reasonably tend to coerce or intimidate the employee, or, in the case of a statement, whether the employee could reasonably have drawn a coercive inference from the statement. Federal Mediation and Conciliation Service, 9 FLRA 199, 208 (1982).

Under that test, it is clear that Mr. Scott's statements to Mr. Carroll on June 11 and on June 13 violated Section 7116(a)(1) of the Statute. The June 11 statement to Mr. Carroll was that he was not going to assign "Old Yellow" to him and that he was not on the job enough to deserve it because of his union time. This remark was made during the course of a meeting in which Mr. Carroll was requesting assignment of a particular piece of tractor equipment known as "Old Yellow," asserting his right to the vehicle based on the past seniority practice in the Motor Pool, and complaining about the denial of the assignment to him. Mr. Scott's statement is unambiguous and its meaning plain: employees who work on behalf of the Union do not warrant desirable equipment assignments. Mr. Scott's statement is a clear threat of withdrawal of benefit (i.e., the practice of employees selecting their tractors) directly related to the employee's exercise of his statutory right to engage in activity on behalf of the Union, and would be so interpreted by any reasonable employee.

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[6] This is the statutory burden of proof. See 5 U.S.C. §§ 7118(7) and (8).

Mr. Scott's June 13 statement to Mr. Carroll, that he was going to have to give up the good equipment assigned to him because of the amount of time he spent on union activities or give up his union time, is also violative of Section 7116(a)(1) as it similarly constitutes a direct threat of withdrawal of benefit based on Mr. Carroll's union representational activity. The statement is unambiguous. Any employee who was directly informed that he should give up his equipment or give up his union time would draw a coercive inference from such a remark.

Finally, Mr. Scott's statement to the employees at the July 9 safety meeting is also violative of the Statute. At that meeting, and after announcing a change in working conditions which the employees did not like (i.e., the change in the seniority system for assignment of vehicles) and in response to Mr. Carroll's stated objection to the change, Mr. Scott told the employees that he would assign vehicles to whomever he pleased and that going to the Union to complain about his actions would do the employees no good. Mr. Scott had not told the employees that the Union had already agreed to the change. Thus, the implication of his statement is that he can do as he pleases without respecting his statutory obligations. Under such circumstances, his statement demeans the Union and makes it appear powerless to the employees it represents.

II. The General Counsel has not established, by a preponderance of the evidence, that Respondent discriminatorily refused to assign equipment to a union steward.

Section 7102 of the Statute guarantees an employee's right to form, join or assist a labor organization. The abridgement of this right by discrimination in connection with hiring, tenure, promotion, or other conditions of employment is an unfair labor practice pursuant to Section 7116(a)(2) of the Statute. United States Marine Corps, Marine Corps Logistics Base, Barstow, California, 5 FLRA 725, 742 (1981). The essential elements to establish a 7116(a)(2) violation are: that the employee has engaged in protected activity; that the agency had knowledge thereof; and that the agency took action because of union animus. Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 19 FLRA 956, 970 (1985). An agency's animus may be established by direct or circumstantial evidence, including evidence demonstrating the pretextual nature of the reasons asserted by the agency for its actions. Customs, Region IV, supra; Department of the Navy, Norfolk Naval Base, Norfolk, Virginia, 14 FLRA 731, 748 (1984).

Once the General Counsel has established a prima facie showing that the employee engaged in protected activity and that the protected conduct was a motivating factor in Respondent's action, the agency may avoid responsibility only by showing by a preponderance of the evidence that it would have reached the same decision or taken the same action even in the absence of protected activity. Internal Revenue Service, Washington, D.C., 6 FLRA 96, 99 (1981).

In the instant case, the record discloses that Mr. Carroll was engaged in protected representational activity on behalf of the Local 1931. He is its Chief Steward and in that capacity and, pursuant to his entitlement under the parties' collective bargaining agreement, he uses approximately two hours of official time each day. Mr. Carroll's first-line supervisor, Mr. Scott, as well as his second and third-line supervisors, were aware of Mr. Carroll's union position and his daily use of official time. Thus, it is abundantly clear that the agency had knowledge that Carroll was engaged in protected activity.

The preponderance of credible evidence adduced at the hearing establishes an unlawful motivation in refusing to assign "Old Yellow" to Don Carroll. In that regard, on June 11 and again on June 13, Mr. Scott told Mr. Carroll, in no uncertain terms, that because of the union time he spent each day, he was not going to assign "Old Yellow" to him. Indeed, on June 13th, Mr. Scott went so far as to tell Mr. Carroll that either he was going to have to give up his union time or his good equipment.

No lawful motivation can be derived from Mr. Scott's statements. In that regard, the Authority has recognized that an accommodation may be made between management's right and obligation to accomplish its mission consistent with an effective and efficient government and the right of a union to perform its representational function. American Federation of Government Employees, AFL-CIO, Council of Locals No. 214, 19 FLRA 215, 218 (1985). Accordingly, were Respondent able to show that its needs and requirements regarding the performance of its assigned work necessitated use of "Old Yellow" for eight hours a day, then at least arguably Respondent would have a legitimate reason for not assigning the tractor to Mr. Carroll, who takes two hours official time each day. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 15 FLRA 867 (1984). But management has offered no evidence to suggest that there are legitimate, work-related reasons why "Old Yellow" should be in use eight hours a day. There is no evidence that any work cannot be performed without "Old Yellow". Moreover, there is evidence that other employees can be assigned to use "Old Yellow" when Mr. Carroll is unavailable because of his union representational responsibilities, and if "Old Yellow" is needed to perform a particular job. See finding 7, above.

However, the credible evidence shows that, despite Mr. Scott's flaunting of his supervisory status to Mr. Carroll and taunts that he would not be assigned "Old Yellow" because of his union activities, Mr.

Carroll was ineligible, anyway, for the assignment of "Old Yellow" under the changed seniority system in effect when Mr. Carroll asked Mr. Scott for "Old Yellow." I have found that the Union had approved the change by at least the latter part of May 1985. See finding 15f, above. Mr. Carroll went to Mr. Scott about the assignment on June 11. See finding 9, above.[7] One can only speculate as to why Mr. Scott did not explain this change to Mr. Carroll and, later, the unit employees as the reason for not assigning "Old Yellow" to Mr. Carroll. The reason may be as simple as a supervisor, in a new role, anxious to emphasize his authority in the face of an assertive union official.

III. The General Counsel has not established, by the preponderance of the evidence, that Respondent implemented a change in working conditions (discontinuing the practice of assigning Motor Pool equipment on the basis of seniority) without notice to the Union and an opportunity to bargain, as alleged in the complaint.

According to the credited testimony of management officials, they gave notice to the Union of the proposed change; the Union made no request to bargain; and, indeed the Union President apparently concurred in the changes. See finding 15f, above.

Other issues raised by the parties need not be resolved as a result of the conclusions already reached and discussed in this decision.

Ultimate Findings and Recommended Order

1. Respondent has violated Section 7116(a)(1) of the Statute, as alleged in the complaint.

2. Respondent has not violated Sections 7116(a)(2) or (5) of the Statute, as alleged.

Pursuant to Section 7118 of the Statute and 5 C.F.R. 2423.29, it is hereby ORDERED that Respondent:

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[7] The General Counsel argues that Mr. Scott went to Mr. Wright, the Union President, about the change after Mr. Carroll had complained about Mr. Scott's refusal to assign "Old Yellow" to him and cites TR. 106-107. See G.C. Br. 15. The General Counsel reads too much into that particular piece of testimony and fails to relate it back to the testimony that Mr. Scott had received "feedback" that Mr. Carroll was unhappy because Mr. Scott had assigned "Old Yellow" to Steve Adams, in the latter part of May, and then pulled it back in order to give the Union time to talk to Mr. Carroll. See TR. 93-94.

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Donald Carroll, or any other employee, in the exercise of rights assured by the Federal Service Labor-Management Relations Statute by telling Mr. Carroll that he is not on the job enough to deserve assignment of the tractor known as "Old Yellow" because of his use of representational time on behalf of the American Federation of Government Employees, Local 1931; by threatening to withdraw assignment of "good equipment" from Mr. Carroll if he continues his activities on behalf of the Union; and by telling employees that it will do them no good to contact the Union with their complaints concerning actions taken by the supervisor.

(b) In any like or related manner, interfering with, restraining or coercing any employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facility in Concord, California copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander of Concord Naval Weapons Station or his designated agent and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, San Francisco, in writing within thirty (30) days of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: January 22, 1986
Washington, D.C.

[9-CA-50343]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce Donald Carroll, or any other employee, in the exercise of rights assured by the Federal Service Labor-Management Relations Statute by telling Mr. Carroll that he is not on the job enough to deserve assignment of the tractor known as "Old Yellow" because of his use of representational time on behalf of the American Federation of Government Employees, Local 1931; by threatening to withdraw assignment of "good equipment" from Mr. Carroll if he continues his activities on behalf of the Union;" and by telling employees that it will do them no good to contact the Union with their complaints concerning actions taken by their supervisor.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 9, whose address is: 530 Bush Street, Suite 542, San Francisco, California, 94108 and whose telephone number is: (415) 556-8106.

9-3/58

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 58

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

April 30, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 3-CA-50403 (March 18, 1986)

Veterans Administration Medical Center, Huntington, West Virginia and American Federation of Government Employees, Local 2344, AFL-CIO

Case No. 2-CA-50074 (April24, 1986)

Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Newark District Office and National Treasury Employees Union, Chapter 60

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DEPOSITORY 374

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y3.F31/21-3:

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, HUNTINGTON, WEST VIRGINIA

Respondent

and

Case No. 3-CA-50403

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2344, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on February 6, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

READEX FICHE best copy available

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., March 18, 1986

Harold D. Kessler

Harold D. Kessler
Managing Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . . :

VETERANS ADMINISTRATION :
MEDICAL CENTER, :
HUNTINGTON, WEST VIRGINIA :

Respondent :

and : Case No.: 3-CA-50403

AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES, LOCAL :
2344, AFL-CIO :

Charging Party :

. . . . :

Peter A. Niceler, Esquire
For the Respondent

Phillip Boyer, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,1/ and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether the Chief of Respondent's Medical Information Section in a counseling session,

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(1) will be referred to, simply, as "§ 16(a)(1)".

unrelated to two grievances filed by a bargaining unit employee, brought up the grievances, which were neither before him nor was he the deciding official, and stated, in essence, to the employee that he, the Chief, Medical Information Section, had the final decision on the employee's performance evaluation, and whether the statement if made, which was denied, violated § 16(a)(1) of the Statute. This case was initiated by a charge filed on July 2, 1985 (G.C. Exh. 1(a)), which alleged violation of §§ 16(a)(1) through (3). The Complaint and Notice of Hearing issued on September 23, 1985 (G.C. Exh. 1(c)); the Complaint alleged violation of § 16(a)(1) only; set the hearing for November 14, 1985; and pursuant thereto a hearing was duly held on November 14, 1985, in Huntington, West Virginia, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present, and did present, oral argument. At the close of the hearing, December 14, 1985, was fixed as the date for mailing post-hearing briefs and General Counsel and Respondent each timely mailed an excellent brief, received on, or before, December 20, 1985, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees/ National Veterans Administration Council of Veterans Administrative Locals, AFL-CIO (AFGE) is recognized as the exclusive representative for all non-professional employees, full-time, part-time and temporary, in units consolidated and certified as more fully set forth in Article 1, Section 1, of the parties' agreement (G.C. Exh. 2). The AFGE Local at the Veterans Administration Medical Center, Huntington, West Virginia, is Local 2344, hereinafter, also, referred to as the "Union".

2. On April 29, 1985, Ms. Carol Ramey, Steward for the Union, filed two separate grievances (G.C. Exhs. 3 and 4) with Ms. June Chapman on behalf of Mr. Ronald (Ron) G. Ferguson a medical file clerk. Mr. Ferguson, a member of the Union, had been employed by the Medical Center as a file clerk for almost six years (Tr. 24). One of his grievances, General Counsel Exhibit 4, concerned the performance standard for the job of medical file clerk. Ms. Chapman was Mr. Ferguson's immediate supervisor, and, pursuant to

Article 13, Section 7, of the parties' Agreement (G.C. Exh. 2), grievances must be presented to the immediate supervisor who must provide a written Answer within 14 calendar days. If a grievance is not satisfactorily resolved at the first step (the immediate supervisor), it may be presented to the "Service/Division Chief, or designee" within 7 calendar days of the Step 1 supervisor's decision. In Mr. Ferguson's case, the second step would have been to Mrs. Judy Barron, his Service Chief (Tr. 37), i.e., Mr. William E. Cox, who was at all times material Chief of the Medical Information Section and Ms. Chapman's immediate supervisor (Mr. Ferguson's second line supervisor), had no prescribed role in deciding Mr. Ferguson's grievances. (Tr. 46).

3. On, or about, April 16, 1985, Mr. Ferguson received his performance evaluation from Ms. Chapman (Tr. 19, 60). Mr. Cox was on annual leave from April 15 through April 19, 1985 (Tr. 54) and received Mr. Ferguson's appraisal for approval sometime after his return, i.e. on, or after, April 22d/ Mr. Ferguson had filed a response on April 22 (Tr. 60), and Mr. Cox approved the performance evaluation on April 30, 1985 (Tr. 54), sometime after his meeting with Mr. Ferguson on April 30, 1985, for counseling on other matters[2] (Tr. 54). Mr. Cox testified that he had, ". . . discussed with Mrs. Chapman to ask what documentation she had, what was her justification for giving the rate. Then I concurred with the rating." (Tr. 54). Mr. Cox testified that he did not meet or discuss the performance appraisal with Mr. Ferguson (Tr. 54) and testified that he made no statement whatever to Mr. Ferguson to the effect that he had, ". . . the last say on his performance evaluation in relation to any grievances that he filed" (Tr. 54).

4. Mr. Cox was employed as Chief of the Medical Information Section, which included the medical file room, in September, 1984. Mr. Cox testified that before he accepted the position, the Chief of Medical Administration Services (MAS), Mrs. Barron (Tr. 13-14), had told him that there were problems in the file room with absenteeism, workload and that people were afraid of the file clerks (Tr. 41); that he had not really known what Mrs. Barron had meant until he arrived, but, after assuming his duties, found that some doctors would not go into the file room to get charts

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[2] Mr. Ferguson's performance evaluation was not introduced as an exhibit; his evaluation was not otherwise shown; and his actual performance evaluation is not at issue.

because they were physically afraid of the file clerks (Tr. 41, 56) and further that the workload of the file room was backlogged (Tr. 41). Mr. Cox stated that he personally received numerous complaints from two doctors about the file room and, after observing the section, called a meeting of the three full time file clerks, Messrs. Ferguson and Ernie Fuller, and Ms. Rebecca Pinnick, in November, 1984, and discussed their conduct and told them he ". . . did not care what was done in the past; that I wanted them to improve and that any further complaints would be handled on an individual basis." (Tr. 42). Mr. Ferguson placed this meeting in "approximately September" (Tr. 31), rather than November, and characterized Mr. Cox's statement to them as, ". . . He wasn't going to take any guff off of us." (Tr. 31). Mr. Ferguson readily conceded that the reputation of the file room was bad (Tr. 32), but placed the blame on Mr. Fuller, no longer employed by the Medical Center (Tr. 96), who, he said, inter alia, sent remains of his lunch, such as chicken bones, ". . . through the hospital in the mailing envelopes" (Tr. 32), and had, on more than an occasion, ". . . brought a pillow and went behind the file cabinets and went to sleep . . ." (Tr. 33). Mr. Ferguson denied that he took part in any of Mr. Fuller's escapades (Tr. 33), but said the whole department was blamed, ". . . everybody in it and everything else that was there was bad." (Tr. 32). Ms. Eileen Farren, personnel officer, testified that, although Mr. Ferguson never admitted participating and no disciplinary action had been taken, supervisors had witnessed Messrs. Ferguson and Fuller participating in shenanigans, including the sending of a live mouse in the hospital mail (Tr. 78-81).

Mr. Ferguson, even apart from the foregoing, was shown to be less than a model employee. Thus, Ms. Linda Yates, a medical data clerk who works down the hall from the file room and whose duties require her daily presence in the file room (Tr. 84), testified that she had heard Mr. Ferguson curse his supervisor, Ms. Chapman (Tr. 85), and had heard Mr. Ferguson make the statement that, "'I feel like I will be sick on so-and-so date'. When the time came he would be sick on that date." (Tr. 86). Mr. Ferguson denied that he ever cursed at Ms. Chapman (Tr. 24) and denied that he ever planned in advance to "be sick" (Tr. 33). Mr. Cox testified that from September, 1984, to June, 1985, Mr. Ferguson took 220 hours of sick leave, 50% of which was either on a Friday or a Monday (Tr. 44-45), as well as 75 hours annual leave during the same period (Tr. 45). Mr. Cox further testified that on, or about, April 8, 1985, Mr. Ferguson had ignored a direct order to remove some aluminum cans for an inspection (Tr. 63) and that he, Cox, had had to remove them (Tr. 63).

Ms. Farren testified that Mr. Ferguson had come to her to try to find another job because he was having problems with his supervisor, Ms. Chapman (Tr. 71-72), and during the conversation stated, with regard to Ms. Chapman, ". . . Some backs were going to have to be broken, that he had only been playing, you know, games with her up until that point." (Tr. 74-75). Mr. Ferguson denied that he ever said he was playing mind games with Ms. Chapman (Tr. 25).

5. On Friday, April 26, 1985, Mr. Ferguson reported for work an hour late and on the following Monday, April 29, reported for work 30 minutes late (Tr. 46). On April 30, 1985, at about 8:50 a.m. Mr. Cox called Mr. Ferguson to his office for counseling. There is no disagreement that when Mr. Cox called Mr. Ferguson to come to his office he did not say what he wanted to discuss (Tr. 20, 58); but from this point there is little agreement as to what occurred. Mr. Cox testified,

> ". . . when he [Ferguson] arrived I explained to him, strictly verbal counseling on tardiness, although there was 2 I was aware of, 2 grievances that these were totally not related to the grievances whatsoever; that June Chapman would handle the grievances. I wanted to clarify none of this was related to anything that he had submitted there. . . . It was a statement saying, 'Ron, you have submitted 2 grievances. Your immediate supervisor will handle these. It has nothing to do with the verbal counseling that you are giving (getting) today. The verbal counseling is strictly for your tardiness on the 2 days mentioned.'" (Tr. 51).

and later reiterated,

> "A. . . . I said, 'Mr. Ferguson, this has nothing to do with the grievance. It will be handled directly by Mrs. Chapman'. Again, this--it was a separate entity from what he was called up to my office for." (Tr. 58-59).

Mr. Cox stated that only tardiness was discussed (Tr. 51, 52); and categorically denied that any other subject was discussed (Tr. 51); stated that he did not talk to him about AWOL (Tr. 51); attitude (Tr. 51); performance evaluation (Tr. 53); performance appraisal (Tr. 54); or grievances (Tr. 58), except to tell him that the counseling had nothing to do with the grievances (Tr. 51, 58). Mr. Cox stated that the meeting was, ". . . brief, to the point. Mr. Ferguson knew that he was late, because he was required to take annual leave on both occasions . . . I explained to him that . . . tardiness by being late hurts . . . goal or mission . . . the goal or mission of the hospital. . . ." (Tr. 52). Mr. Cox stated that he did not make the statement that ". . . he had shit for brains" (Tr. 52).3/ Mr. Cox made a written note of the meeting with Mr. Ferguson; Mr. Ferguson requested copies; and Mr. Cox furnished two copies (V.A. Exh. 1) to Mr. Ferguson prior to the second meeting with Ms. Ramey (Tr. 48-50; 62).

Mr. Ferguson's version of the meeting was as follows:

> ". . . I walked upstairs. He [Cox] said he wanted to counsel me on the tardiness.
>
> . . .
>
> "A. He discussed tardiness, performance and standards of grievance I had on Miss Chapman's desk and that I wasn't fit as a V.A. employee, that my attitude is bad and that I needed . . . help with the psychiatric doctors. He told me I had shit for brains.
>
> "Q. Okay. Now, taking those aspects of the conversation one at a time, did you ask for union representation?
>
> "A. Yes, I asked for that when I got to the office and it was denied; he

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3/ There was a second meeting on April 30, 1985, attended by Messrs. Cox and Ferguson with Union steward Ramey present. Mr. Ferguson did not testify concerning the second meeting and Mr. Cox's testimony with regard thereto will be considered hereinafter in conjunction with Ms. Ramey's testimony.

would like to talk to me one-on-one and counsel me one-on-one.

> "Q. You mentioned that he discussed --did he raise the issue of grievances?
>
> "A. Yes, he did, what he seen on Miss Chapman's desk.
>
> "Q. Did he start anything else as to grievances?
>
> "A. Had the final say-so in the final performance and grievance.
>
> . . .
>
> "Q. Now, you testified a moment ago that Mr. Cox made remarks regarding shit for brains?
>
> "A. Yes.
>
> . . .
>
> "Q. Was this statement made after he had raised the issue of grievances?
>
> "A. Right. Yes, right after. That is when I walked out and called my union steward." (Tr. 20-21).

On cross-examination, Mr. Ferguson was asked:

> "NICELER: Okay. This counseling that you received, is this the first time that you have been counseled about sick leave or being tardy? (Tr. 27).

Mr. Ferguson responded:

> "A. Yes, on tardiness, but he didn't just put my tardiness -- he didn't just counsel me on tardiness. See, where you are wrong, he counseled me on tardiness, AWOL, performance appraisal, grievances. He told me that I can file a grievance any time I wanted to and take them and shove them.

"NICELER: Are those his words?

"A. Yes, they are.

"Q. You could take them and shove them?

"A. I could take them and shove them.

"Q. Okay. You say he did in a meeting counsel you about leave abuse?

"A. Sick leave restriction there, yes, sick leave restriction. He -- counseled me on tardiness and AWOL and --

"Q. You never had been counseled about AWOL before?

A. No.

"Q. About how many times would you say you have been counseled in the past year for problems such as AWOL, sick leave abuse, that sort of thing?

"A. Once.

. . .

"A. Well, Mr. Cox -- he called it a counseling, but I called it a chewing out, that was just that time for -- no, he counseled me twice, once for tardiness and the other one for sick leave restriction." (Tr. 27-28).

Following the 8:50 a.m. meeting, Mr. Ferguson did contact Union Steward Ramey who called Mr. Cox for an appointment for her and Mr. Ferguson to meet with him (Tr. 89, 59) and Mr. Cox agreed to meet with them (Tr. 59). The second meeting was held either at 1:00 or 1:30 p.m., as Mr. Cox stated (Tr. 61), or at 11:15 a.m., as Ms. Ramey stated (Tr. 89). Ms. Ramey testified that the following took place:

". . . I asked him if he was in fact giving a--counseling Mr. Ferguson for tardiness why he brought up the grievances. That is

> when he stated that he had seen them on June Chapman's desk. That is what made him aware, he saw them, and June would be getting back with him. Then I asked in what context and why he said he had a final decision on Ron Ferguson's performance evaluation. That is when I told him he did not in fact have the final word, because it would have to go up to the director and be the director that would have the final word. That is when Ron said the work intimidation. . . . That is when Mr. Cox stood up and by this time they were both agitated. Mr. Cox's face was really red. He pointed his fingers at Ron and he told him, 'I have had it with you'. That's when Mr. Ferguson had said intimidation. 'Hey, Bill, we came up here as an informal type of grievance so it wouldn't go to a formal grievance'. Mr. Cox said, 'Bull crap! Go ahead and grieve it'. And he said to me and Ron both that he could file harassment charges against us too. Ron has got a temper too. I didn't continue it--didn't want to continue any confrontation. I said, 'Okay, Bill, we thank you for your time. I am going to end this now'." (Tr. 90-91).

Ms. Ramey's notes, made during the meeting, are to the same effect (G.C. Exh. 5).

Mr. Cox testified that,

> ". . . I told Mr. Ferguson I did not like his accusations. If he felt I was unfair, in other words, that is where he made the comment that I stated that, excuse me, he had shit for brains. Told Mr. Ferguson that was a lie and that if he felt I made that comment he could reduce it to writing and the meeting ended at that point." (Tr. 59).

Conclusions

There is no dispute that on April 30, 1985, when Mr. Cox called Mr. Ferguson to his office for counseling for tardiness he, Cox, broached the matter of two grievances which

Mr. Ferguson had filed the day before. Mr. Cox readily admitted that he did, but, he stated, only to make it clear to Mr. Ferguson that the verbal counseling was ". . . strictly for tardiness. . . ." (Tr. 51) and that Ms. Chapman, Mr. Ferguson's immediate supervisor, would handle the grievances.

Mr. Ferguson testified, in part, that Mr. Cox, ". . . discussed . . . performance and standards of grievance" (Tr. 20) and asserted that Mr. Cox said he, "Had the final say-so in the final performance and grievance" (Tr. 21); ". . . had the final word on your performance and appraisal" (Tr. 22); ". . . final say-so on performance standard. . ." (Tr. 23); which Ms. Ramey transmuted to ". . . final decision on . . . performance evaluation" (Tr. 90).

The grievance in question, General Counsel's Exhibit 4, did not mention Mr. Ferguson's performance evaluation; but, rather, the performance standard, and the relief sought was "a revised performance standard. . ." (G.C. Exh. 4). I am convinced that Mr. Cox did not make any statement to Mr. Ferguson concerning Mr. Ferguson's performance evaluation and, to this extent, I credit Mr. Cox's denial (Tr. 54). Indeed, close examination of Mr. Ferguson's testimony fails to support reference to Mr. Ferguson's performance evaluation. Rather, Mr. Ferguson's testimony points to "final word on your performance standard", which is consistent with all testimony that Mr. Cox referred to the two grievances, one of which sought revision of Mr. Ferguson's performance standard. Did Mr. Cox, then, tell Mr. Ferguson that he had the "final word" on Mr. Ferguson's performance standard? I conclude that he did. First, Mr. Cox conceded that he brought up the subject of the two grievances. Second, Mr. Ferguson testified that Mr. Cox said he had the "final say-so", or "final word", on something, which he variously identified as: "performance and grievance", "performance and appraisal", and "performance standard". Third, all testimony shows that Mr. Cox's reference was to the grievances, and in particular, as concerns this case, to General Counsel Exhibit 4, which would be consistent with Mr. Ferguson's testimony that Mr. Cox said he had the "final word on your performance standard." Fourth, Mr. Cox had a tendency to go beyond the issues at hand, as shown by his broaching the subject of grievances at all in a counseling for tardiness and as further shown by the testimony of Ms. Ramey (Tr. 111), and it would have been wholly consistent with this tendency for him to have injected some comment concerning performance standard. Fifth, although Mr. Cox denied that he made any statement ". . . whatsoever about having the last say on his performance evaluation in relation to any grievances . . ." (Tr. 54) and, indeed, further stated that he, ". . . did not ever meet or discuss performance appraisal with Mr. Ferguson . . . I did not discuss the performance appraisal. . . ." (Tr. 54), he was not asked whether he had made reference to establishment of a performance standard, notwithstanding that Mr. Ferguson had earlier so testified. Accordingly, as Mr. Ferguson's testimony in this regard was neither controverted nor denied I credit Mr. Ferguson's testimony that Mr. Cox did say he had the final word on Mr. Ferguson's performance standard.4/

Did Respondent violate § 16(a)(1) of the Statute by the conduct of Mr. Cox on April 30, 1985? I conclude that it did. Mr. Cox's reference to the grievances at the outset of his counseling of Mr. Ferguson for tardiness was, at the least, strange. Why would a supervisor bring up a matter that was not before him? Mr. Cox said he did so only to make it clear to Mr. Ferguson that the counseling was only for tardiness. As I find that Mr. Cox did tell Mr. Ferguson that the grievances would be handled by Ms. Chapman (Tr. 51, 90), Mr. Cox's explanation would be persuasive if Mr. Cox had said no more; but he did say more. Mr. Ferguson testified that Mr. Cox said, ". . . I can file a grievance any time I wanted to and take them and shove them." (Tr. 27). Mr. Cox was never asked, and, accordingly, did not deny, that he had made any statement to Mr. Ferguson to this effect. I have further found that Mr. Cox told Mr. Ferguson that he, Cox, had had the final word on Ferguson's performance standard. In this context, Mr. Cox's statements all fall into place. Thus, as he admitted, he told Mr. Ferguson, in effect, that he was aware of the grievances which he had seen on Ms. Chapman's desk; that the grievances would be handled by Ms. Chapman; that, as Mr. Ferguson testified, Mr. Cox said

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4/ I am aware that the Complaint (G.C. Exh. 1(c), Par. 5) alleged that Mr. Cox stated that he ". . . had the final decision on the unit employee's performance evaluation," which precise allegation I have found was not sustained; but, instead, that Mr. Cox said that he had the final word on the unit employee's [Mr. Ferguson's] performance standard. Although the statement found to have been made was not the precise statement alleged in the Complaint, it is closely related; was litigated without objection; and I conclude that the allegations of the Complaint are sufficiently broad as to include the statement found to have been made.

that he [Ferguson] could file a grievance any time he liked [on performance standard]; but, as I have found, Mr. Cox said that he, Cox, had the final word on Ferguson's performance standard.

One view of such statements might be that they were not in violation of § 16(a)(1) because Mr. Cox did no more than correctly state the law; i.e., it could be argued that Mr. Cox said, in effect, that he was aware of the grievances, which would be handled by Ms. Chapman, but he wanted him to understand that performance standards are determined by management and, regardless of how many grievances he filed about performance standards, that he, Cox, would have the final word on performance standards. The other view, which I adopt, is that the statements interfered with, restrained and coerced Mr. Ferguson because they created the reasonable impression that the filing of grievances would have an adverse effect on Mr. Ferguson's condition of employment. General Services Administration, National Capital Region, 4 FLRA No. 69, 4 FLRA 502 (1980); Federal Election Commission, 6 FLRA No. 59, 6 FLRA 327 (1981); U.S. Army Military Traffic Management Command, Eastern Area, Bayonne, N.J., 16 FLRA No. 123, 16 FLRA 881 (1984). See, also, United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA No. 116, 3 FLRA 724 (1980). First, Mr. Cox's interjection of the subject of the grievances in a counseling for tardiness suggests some ulterior motive. Second, Mr. Cox did not purport to explain that a performance standard can not be established through a grievance procedure; but, rather, as Mr. Ferguson testified, and I credit his testimony in this regard in the absence of a denial by Mr. Cox of the statement attributed to him,[5] Mr. Cox said,

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[5] I have given careful consideration to the possibility that the reference to "grievance" occurred only at the second meeting and in terms different than as represented by Mr. Ferguson. Thus, Ms. Ramey testified that when she asked why he told Mr. Ferguson, ". . . he had a final decision on Ron Ferguson's performance evaluation" Mr. Cox pointed to Ferguson and said "I have had it with you", whereupon Ferguson said, ". . . we came up here as an informal type of grievance so it wouldn't go to a formal grievance" and Mr. Cox had responded, "Bull crap! So go ahead and grieve it" and that ". . . he could file harassment charges against us too." Mr. Cox testified that, ". . . I told Mr. Ferguson I

(continued)

in derogatory terms, in substance, you can take your grievances ". . . and shove them". Third, Mr. Cox linked this statement with his further statement that he had the final word on Mr. Ferguson's performance standard which reasonably meant to Mr. Ferguson that his filing grievances would have some adverse effect on his employment. Fourth, Mr. Cox referred to both of Mr. Ferguson's grievances, not merely to the grievance (General Counsel's Exhibit 4) which concerned Mr. Ferguson's performance standard. Fifth, Mr. Ferguson testified that when Mr. Cox raised the issue of grievances ". . . I walked out and called my union steward."

I do not credit Mr. Ferguson's testimony that Mr. Cox made any statement concerning his fitness as a V.A. employee and/or that any discussion ensued at this meeting (8:50 a.m.) concerning psychiatric help. That such discussion occurred is inconsistent with Mr. Ferguson's testimony that when Mr. Cox mentioned grievances he walked out and called his Union Steward; was denied by Mr. Cox; was not mentioned by Ms, Ramey; and that the meeting was brief and to the point was fully confirmed by Mr. Cox's testimony. Further, I specifically do not credit Mr. Ferguson's testimony that Mr. Cox said he, Ferguson, had ". . . shit for brains". Mr. Cox categorically denied that he made any such statement and testified that, at the second meeting, when Mr. Ferguson said he had made the statement, he, ". . . Told Mr. Ferguson that was a lie and that if he felt I made that comment he could reduce it to writing. . ." Accordingly, I credit Mr. Cox's denial.

Having found that Respondent violated § 16(a)(1) of the Statute, I recommend that the Authority adopt the following:

(footnote continued)

did not like his accusations . . . that is where he made the comment that I stated that, excuse me, he had shit for brains. Told Mr. Ferguson that was a lie and that if he felt I made that comment he could reduce it to writing and the meeting ended at that point."

While raising doubt, Mr. Cox did not, specifically, admit that he ever mentioned "grievance", although both Mr. Ferguson and Ms. Ramey testified that he did, and, of course, Mr. Cox never denied the statement attributed to him by Mr. Ferguson in the first meeting. Accordingly, I credit Mr. Ferguson's testimony in this regard, as more fully set forth herein above.

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that Veterans Administration Medical Center, Huntington, West Virginia, shall:

1. Cease and desist from:

   (a) Interfering with, or discouraging, by implied threats or other means, Ronald G. Ferguson, or any other employee, from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

   (b) Threatening Ronald G. Ferguson or any other employee that they may have their employment adversely affected because they have filed a grievance under the negotiated grievance procedure.

   (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   (a) Post at its facilities at Veterans Administration Medical Center, Huntington, West Virginia, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Medical Center, or designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, 1111 - 18th Street, NW., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 6, 1986
Washington, D.C.

[3-CA-50403]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, or discourage, by implied threats or other means, Ronald G. Ferguson, or any other employee, from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT threaten our employees that they may have their employment adversely affected because they have filed a grievance under the negotiated grievance procedure.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees of their rights assured by the Statute.

____
(Agency or Activity)

Dated: ______________ By: _______________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, NW., Suite 700, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

[2-CA-50074]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
WASHINGTON, D.C. AND INTERNAL
REVENUE SERVICE, NEWARK
DISTRICT OFFICE

Respondent

and

Case No. 2-CA-50074

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 60

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on March 17, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action. In the "Notice of Transmittal of Decision", the Administrative Law Judge stated, in pertinent part, that "the filing of exceptions to the attached Decision, is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27", and advised in the Notice that, "Any such exceptions must be filed on or before April 16, 1986, and addressed to:

Federal Labor Relations Authority
500 C Street, SW., Docket Room 213
Washington, D.C. 20424"

No exceptions were filed with the Authority at the prescribed address within the prescribed time limit. Instead, the Respondent's exceptions dated April 16, 1986, were addressed to the Chief Administrative Law Judge and filed with the Office of Administrative Law Judges in Washington, D.C., on April 17, 1986.

Section 2429.21 of the Authority's Rules and Regulations provides, in pertinent part:

> When this subchapter requires the filing of any paper, such document must be received by the Authority . . . before the close of business on the last day of the time limit, if any, for such filing . . . .

Thus, under the Authority's rules of procedure, date filed means date received by the Authority.

The Authority finds that no exceptions to the Decision and Order of the Administrative Law Judge were filed with the Authority within the time limits prescribed for such filings. Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., April 24, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[2-CA-50074]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OFADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

INTERNAL REVENUE SERVICE, :
WASHINGTON, D.C. AND INTERNAL :
REVENUE SERVICE, NEWARK :
DISTRICT OFFICE :
Respondent :
: Case No. 2-CA-50074
and :
:
NATIONAL TREASURY EMPLOYEES :
UNION AND NATIONAL TREASURY :
EMPLOYEES UNION, CHAPTER 60 :
:
Charging Party :

. . . .

Mary Weston Heck, Esq. with
David J. Markman, Esq. on the brief
For the Respondent

Michael J. McAuley, Esq. with
Phillip J. Kellett, Esq. and
Todd C. Park, Esq. on the brief
For the Charging Party

Joel M. Hornstein, Esq. and
E. A. Jones, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq.

Upon an unfair labor practice charge filed by the National Treasury Employees Union and National Treasury Employees Union, Chapter 60 (herein referred to as the Charging Party) against Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Newark District Office (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region II, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain with the Charging Party with regard to proposals concerning the impact and implementation of Respondent's decision to use multiple occupancy work stations (MOWS) at its Atlantic City office.

A hearing on the Complaint was conducted on September 10, 1985 at which all parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by all parties and have been carefully considered.[1]

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein National Treasury Employees Union (herein NTEU) has been, and is now, the certified exclusive representative of a consolidated nationwide unit of certain employees of the Internal Revenue Service, including all professional and nonprofessional employees employed in the District, Region and National Offices of the Internal Revenue Service, excluding other employees not relevant herein. Further, National Treasury Employees Union, Chapter 60, (herein Chapter 60 or the Union) acts as agent for NTEU for the purpose of representing certain of Respondent's unit employees, including those employed at the Internal Revenue Service, Newark District Office, and Chapter 60's delegation has been recognized by Respondent. The collective bargaining agreement between Respondent and NTEU (herein the National agreement),[2] in effect at all times relevant hereto, reveals that NTEU has delegated authority to Chapter 60 to negotiate with Respondent regarding certain working conditions which affect only District employees.

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[1] Counsel for the General Counsel's unopposed Motion to Correct Transcript is hereby granted. It is obvious that item 19 in this motion which refers to page 29 of the transcript was meant to refer to page 27 and is so noted.

[2] The record discloses no evidence bearing upon the size of the overall unit. However, in Department of the Treasury, Internal Revenue Service and its Cleveland, Ohio District Office, 20 FLRA No. 43 (1985), infra, the Authority found that 60 District Offices are covered by the parties' National agreement.

On April 6, 1984 Carol M. Bello, Chief, Resources Management Division at Respondent's Newark District Office, sent the following letter to Israel Weiner, President of Chapter 60:

> "This letter is to officially inform you of a study that is being conducted to analyze the impact of implementing the Multiple Occupancy Workstation (MOWS) concept for all Revenue Officer and Revenue Agent field groups.
>
> "We are currently using MOWS configurations only in Camden, Mountainside, Newark, New Brunswick and Paterson. This study is a first step toward implementing a uniform workstation standard for all Collection and Examination field groups regardless of their location. It will also enable us to reduce our space utilization rate and achieve space/rental savings.
>
> "If you have any comments or proposals regarding this matter please submit them to my office by Friday, April 27, 1984."

Weiner did not respond to this letter since he interpreted the letter to merely notify him of management's embarking on a study of the MOWS concept, not a present intent to implement the concept.

Subsequently, on August 16, 1984 Bellow sent Weiner the following correspondence:

> "This letter is your official notification that we plan on realigning the field exam area in the Atlantic City Post of Duty.[3/] This realignment is required to create space for a new field group. This new group and the existing group will be using multiple occupancy workstations.
>
> "Staffing questions can be addressed to the Chief, Examination Division, Mr. Bernard Lesser. We plan on implementing this realignment on or around September 14, 1984.

[3/] The Atlantic City Post of Duty is a facility within the organizational responsibility of the Newark District.

> "If you have any comments or proposals regarding this matter please submit them to my office by September 7, 1984."

President Weiner responded to Resources Management Chief Bello on September 6, 1984 raising various issues not relevant herein and, inter alia, requesting "that staffing of the new Atlantic City Group be held in status quo ante until enough material is made available to the Union so that proposals can be drawn."

On September 12, 1984 Bello responded to Weiner as follows:

> "I have reviewed both your letters of September 6, 1984 in which you address both the specific realignment of the Atlantic City POD and the overall issue of Multiple Occupancy Work Station's (MOWS). I believe the following addresses the points you raised:
>
> 1. Several years ago IRS and NTEU discussed MOWS at the National level, leaving the decision as to its applicability to local discretion.
>
> 2. We did notify you (our letter of April 6, 1984) regarding our plans to implement MOWS in the PODs in Newark which were not already using this concept. Those study results are attached for your convenience.
>
> 3. In reference to your "status quo ante" request, we have not as yet changed anything in Atlantic City. However, we plan to make the necessary realignments, with MOWS configurations, on September 15, 1984. This is necessary to accommodate the additional employees who have already reported for duty.
>
> "Accordingly, the implementation of the realignment cannot be postponed, due to workload needs. We will, however, consider any impact items you wish to submit in connection with this realignment and, if negotiations should be protracted, will

implement them retroactively. We will grant you additional time for the submission of these items. Your response by September 18, 1984 would, therefore, be appreciated.

"In reference to Jersey City, a realignment of existing furniture is to take place on September 19, 1984. We do not plan to implement MOWS at this time. However, as indicated in my April 6, 1984 letter, it will ultimately be included in our MOWS plans. . . ."

Chapter 60 President Weiner replied to Resources Management Chief Bello on 9/18/84 and, among other things, made the following proposals relative to the Atlantic City Post of Duty:

Proposal 1) - Each work station shall have no more than two (2) employees assigned to it.

Proposal 2) - There will be no decrease in the number of telephones, calculators and paper cutters.

Proposal 3) - Each employee will be situated as to minimize distractions.

Proposal 4) - Employees will be assigned individual file cabinets to the maximum extent practicable. When more than one employee is assigned to a file cabinet, each will have a personal key.

Proposal 5) - Accommodations shall be made so that non-smokers will not be seated at the same tables with smokers.

Proposal 6) - Floor to ceiling partitions shall be utilized between each shared work station.

Proposal 7) - Work areas comply with all appropriate local and federal fire and safety provisions.

Proposal 8) - Each employee be furnished a tray to hold pens, clips, rubber bands, etc. that were previously kept in a desk or other individualized area.

Proposal 9) - Management will make every effort to install acoustical ceilings and/or sound masking systems to cut down on increased noise.

Resources Management Chief Bello's November 11, 1984 reply to Chapter 60 President Weiner was as follows:

> "In your letter dated September 18, 1984, you submitted two sets of proposals regarding Multiple Occupancy Work Stations (MOWS). Your first set of proposals were relative to assigning individual work stations. As you know, the open area concept and shared work stations was introduced in the Mid-Atlantic Region many years ago. Therefore, we see no obligation to address your first set of proposals.
>
> "In that same letter of September 18, 1984, you stated that in the alternative to individual work stations you offered other proposals. We have given careful consideration to that second set of proposals and have determined as follows:
>
> "Proposals 1, 2, 4, 6 and 9 are non-negotiable as they infringe on management rights under 7106 b(1) on the technology, methods, and means of performing work.
>
> "We are under no obligation to negotiate on proposal No. 7 as it is already covered by Article 21, Health & Safety in the NORD (National) Agreement.
>
> "Proposals 3, 5 and 8 are negotiable."[4]

Dorothea Kleinhammer, Assistant Chief, Resources Management Division for Respondent's Newark District, testified that when the District's responses to the Union's proposals were formulated they were routed to the Regional Office and then to Respondent's National Office which must concur in any determination of negotiability or nonnegotiability. Kleinhammer further testified that the Union's proposals were declared nonnegotiable for the following reasons: Proposal 1 - the number of employees at each desk would determine the number of desks required and thereby affect management's right to determine the space arrangement, size and equipment needed to perform the duties of this job and possibly ultimately result in requiring additional space which would affect the agency's budget; Proposal 2 - no change in the number of telephones, calculators or paper cutters was expected to occur; Proposal 4 - the assigning of individual file cabinets is part of management's right to determine what equipment employees needed to perform their jobs; Proposal 6 - since no partitions existed in the office space under consideration at that time, no change took place and further, the matter concerned office design which is a management right; Proposal 7 - the National agreement contained a provision regarding safety regulations and since the matter was covered by the agreement, it was not negotiable at this time; Proposal 9 - providing acoustical ceiling tiles would have required the agency to expend funds for a matter the impact of which was only assumed.

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[4] Thereafter the Union made no further demand to negotiate on the matter. Nor did the Union seek to bargain on the proposals Respondent declared negotiable.

The following provisions in the National agreement are relevant to the issues raised herein:

Article 21 - Health and Safety

> Section 1A. - "The Employer will, to the extent of its authority, provide and maintain safe working conditions for all employees. The union will cooperate to that end and will encourage all employees to work in a safe manner."
>
> Section 1C. - "In Districts and Regions the Employer will designate a safety representative for each post of duty of more than 10 employees; and in the National Office, a representative will be designated for each building housing bargaining unit employees. Representatives will be responsible for reporting to the safety officer any hazardous or unsafe conditions which he/she observes or which are reported to him/her. The Employer will, to the extent of its authority, initiate prompt and appropriate action to correct any unsafe working condition so reported."
>
> Section 10A. - "A Safety Advisory Committee will be established within each office, two members of which will be designated by the Union. The function of the Committee will be to advise the Employer concerning work-related safety matters. In the discharge of its function, the Safety Advisory Committee will consider existing practices and rules relating to safety and formulate suggested changes in existing practices and rules. In their consideration of the foregoing, the Committee will give due regard to Public Law 91-596 and any applicable

guidelines developed by the U.S. Department of Labor related thereto."

Section 10C. - "There will be a quarterly safety inspection of all areas occupied by employees. The Union may designate a representative in the National Office, and a representative at each post of duty in Districts and Regions, who will participate in quarterly inspections made at their respective locations without charge to leave."

Article 39 - Labor-Management Relations Committee

Section 3B.1. - "Where the Employer proposes to make a change in the conditions of employment that is limited just to one appointing office, (e.g., district, region, headquarters) the notice described in Section 3A above may be given to the local chapter president or joint council chairperson. This does not include the right to give the local offices notice of region-wide changes or changes implemented locally, but on a varied basis because the local management officials were given discretion to make changes within certain boundaries. Furthermore, this right to give local notice does not apply to any pilot projects or studies being conducted in just one appointing office."

Section 3C.2(a-h) provides for bargaining procedures applicable to locally negotiated changes.

The record reveals that the Atlantic City Post of Duty is currently staffed by approximately 100 employees including Revenue Agents (Field Agents), Special Enforcement Program Agents, Office Auditors, Collections, Accounting Aids, Clerks and Managers. Respondent implemented the MOWS concept in Atlantic City on or about September 15, 1984 when a new work group was created to develop pay rates for casino employees whose income was primarily generated by tips. The new group, designated the TIP group,5/ added an estimated 12 employees

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5/ Resources Management Division Assistant Chief, Kleinhammer, when testifying at the hearing, referred to the TIP group as a new, "temporary" group. However, the record discloses no further explanation regarding the reference to "temporary," other than suggesting the possibility that at some undisclosed future time the group will cease to exist if and when its objectives are accomplished. Further, there is no indication in the record that the MOWS' approach will be abandoned when and if the TIP group is dissolved.

including Revenue Agents, Office Auditors and Accounting Aids, all of whom were located in one room of the existing Atlantic City office.6/ In any event, the influx of additional employees created a space problem which Respondent sought to resolve by use of the MOWS concept whereby more than one individual was assigned to some desks (or work station) since many field employees frequently perform work away from the office at the location of the taxpayer or while engaging in research. Thus, an individually assigned desk would normally not be occupied 100 percent of the time. Accordingly on or about September 15, 17 Revenue Agents including 3 "Co-ops" infra, at the Atlantic City facility who previously had individually assigned desks and an adjacent filing cabinet were redistributed from occupying four rooms to now occupying two rooms with reduced isle space. The realignment resulted in 12 Revenue Agents sharing six desks in one room (six agents now doubled-up) in a room that previously had only four desks, and five Agents using four desks in another room previously used by four Agents (two Agents now doubled-up).7/ Further, after the realignment four Agents were required to share file cabinets. Thus, now approximately seven Revenue Agents who previously had individually assigned desks now were required to double-up.

Telephone distribution was also affected in that the six desk room with 12 agents now has four telephones available to the Agents as opposed to two telephones available when the room housed four Agents. The four desk room continues to have two telephones assigned to it.

The room where TIP employees are located was previously occupied by six Revenue Agents. That room now houses the 12 TIP employees who are required to share eight work tables and desks in that room. Apparently in that group four Revenue Agents have individually assigned desks and the other employees share the remaining desks and tables. That room now has four or five assigned telephones whereas three telephones were previously located there when it was occupied by Field Agents.

6/ This estimate is taken from the general testimony of Revenue Agent Charles Jones and Group Manager William Clemente since no witness testified as to the exact number of employees comprising the TIP group.

7/ Desks assignments were made by seniority. When Agents were required to double-up, the senior Agent was given access to the desk drawers and the other Agent used the assigned file cabinet to store personal and other materials normally placed in a work desk.

Before the advent of the MOWS system ten desk top calculators were located on desks in the four offices used by Revenue Agents. Those Agents, although now located in two offices, currently have seven calculators available on desks. Some additional hand held calculators were assigned when MOWS was implemented, but some Agents were not provided calculators. One paper cutter still remains available to all office personnel.

Revenue Agents in Atlantic City generally gather information and examine records at the site of the taxpayer and review that data in Respondent's Atlantic City office. It appears that Revenue Agents generally spend approximately 50 percent of their time performing work outside of the Atlantic City office.8/ While journeymen Revenue Agents (GS-11 and above) spend a nominal amount of their time outside the office on training programs, newer Agents spend approximately 15 weeks outside the office in training programs and at least 50 percent of the remainder of their duty time in the office. The three "Co-ops" are students employed by Respondent six months out of the year. While employed, these "Co-ops" remain in the office except for undergoing a seven week training program during the first year of employment. One day a month most Revenue Agents are in the office on the same day to fill out a monthly report. Also, one day a month all agents are required to be in the office for a monthly meeting.

The implementation of the MOWS system has affected Respondent's employees in the Atlantic City Post of Duty in several ways. It is obvious from the testimony and the nature of a Revenue Agent's work and time spent for report writing and meetings that a considerable period of time is spent in the office. The record further reveals that approximately half of the time when in the office one of the agents who shares a desk must find another desk at which to perform assigned work. The desk the agent eventually finds may be in the same room as the assigned desk, in the TIP group office space 15 to 25 feet away, in the office audit area 25 to 60 feet away, or in one of the conference rooms about 70 feet away. Since more than one

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8/ Two Revenue Agents testified that they spent approximately 40 percent of their worktime outside of the office. The Revenue Agent's supervisor testified that the two employees spent between 50 and 60 percent of their work time outside of the office. Absent any other record evidence bearing on this issue I infer that approximately half of a Revenue Agents work is performed out of the Atlantic City Post of Duty.

agent may be looking for an empty desk at the same time, agents sometime argue over who should be able to use the empty desk. Moreover, agents spend a considerable amount of time walking back and forth to their frequently used file cabinets, which are located next to the desks they share, to get cases, reference material, forms and supplies needed in their work. Time spent looking for an empty desk and going back and forth to a file cabinet must be charged to the particular case the agent is working on, thereby affecting the ability of agents to complete cases in a timely manner, a critical element in their work standards. Revenue agents make extensive use of the telephone to make appointments and receive calls from taxpayers relating to their cases. Under the MOWS system agents have missed phone calls because they were not at their usual desks and could not be located. When they are not in their usual work area because the desk they share is occupied and they receive a call which necessitates discussing a case, they must do so while the other agent is at the shared desk. This not only interrupts the work of another agent, it also creates problems concerning the rules relating to taxpayer confidentiality under which agents are not supposed to permit anyone except their group manager to see materials pertaining to a particular taxpayer. Under the IRS Rules of Conduct, breaches of taxpayer confidentiality affect an agent's evaluation and may subject the agent to dismissal; additionally, the agent may be sued by the taxpayer. The same potential problems relating to taxpayer confidentiality also affect those revenue agents who must share filing cabinets. Further, agents sharing file cabinets may experience difficulty in obtaining access to them.

In addition, under the MOWS system agents have reduced access to calculators which they use in their work. Although a revenue agent may choose to share a desk in either a smoking or non-smoking area, when a nonsmoking agent is required to choose an empty desk the desk may have been previously used by an agent who smokes and leaves behind an objectional environment of bad odors and dirty ash trays. Since the rooms are without partitions noise levels and distractions in the Atlantic City POD have increased considerably after the implementation of the MOWS system making it more difficult for Revenue Agents to concentrate and accomplish their duties. The MOWS system has had an overall negative impact on office morale: some agents find it aggravating and discouraging to have to spend unnecessary time looking for an empty desk; arguments occur where they did not before; and some agents who share desks no longer consult with one another for professional advice.[9]

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[9] Many of the adverse consequences of the MOWS system are also applicable to the TIP group, e.g. vying for a desk, sharing tables, smokers and nonsmokers together and noise.

Discussion and Conclusions

Counsel for the General Counsel contends that Chapter 60 President Weiner's proposals of September 18, 1984 dealt with the impact and implementation of the MOWS system and accordingly were negotiable. Counsel for the General Counsel contends that the changes in working conditions brought about by the implementation of MOWS constituted more than a *de minimis* impact on bargaining unit employees and therefore Respondent's refusal to bargain on proposals 1, 2, 4, 6, 7 and 9 constituted a violation of the Statute.

Respondent contends that the Union's proposals were not impact and implementation proposals but instead were integrally related to, and therefore involved, the technology of performing work and accordingly were not negotiable except at the election of the agency.[10] Respondent further argues that Proposal 6 involved no change in conditions of employment; Respondent was not required to bargain on Proposal 7 since the matter is covered by the National agreement; and the impact of use of MOWS was no more *de minimis*. Respondent also urges that in the event a violation is found, no *status quo ante* remedy be imposed since the disruption resulting from such a remedy would far outweigh the impact of implementing the MOW's system.[11]

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[10] Section 7106 of the Statute, delineating management rights under the Statute, provides *inter alia*;

> "(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --
>
> "(1) at the election of the agency, on the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> "(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> "(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

[11] A *status quo ante* remedy has not been requested, *infra*.

It would appear that the MOWS system at the Atlantic City Post of Duty constituted the technology, method, and means of performing the work of the Agency within the meaning of section 7106(b)(1) of the Statute. Indeed, the Complaint alleges only that Respondent violated the Statute by refusing to bargain "over the impact and implementation of the decision to use MOWS . . ." and this contention was repeated in counsel for the General Counsel's opening statement. Even if using MOWS was privileged conduct, Respondent nevertheless was obligated to bargain over the procedures management observed in implementing MOWS and appropriate arrangements for employees adversely affected by MOWS as required by section 7106(b)(2) and (3) respectively.

In my view the Union's proposals at issue, with the exception of Proposal 1, are proposals concerning appropriate arrangements under section 7106(b)(3), or as frequently termed "impact" proposals. In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), the Authority adopted the rationale used by U.S. Circuit Court of Appeals for the District of Columbia in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981), which dealt with the negotiability of impact proposals. The District Court held that impact proposals are not invalid simply because they contravene management rights but ". . . may be inappropriate because they impinge upon management prerogatives to an excessive degree." Following the District Court the Authority in National Association of Government Employees, Local R14-87, supra, held:

> "In this and future cases where the Authority addresses a management allegation that a union proposal of appropriate arrangements is non-negotiable because it conflicts with management rights described in section 7106(a) or (b)(1), the Authority will consider whether such an arrangement is appropriate for negotiation within the meaning of section 7106(b)(3) or, whether it is inappropriate because it excessively interferes with the exercise of management's rights.
>
> "In making that determination, the Authority will first examine the record in each case to ascertain as a threshold question whether a proposal is in fact intended to be an arrange-

ment for employees adversely affected by management's exercise of its rights. In order to address this threshold question, the union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights.

"Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D.C. Circuit, by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as:

> (1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree?
>
> (2) To what extent are the circumstances giving rise to the adverse affects within an employee's control?. . .
>
> (3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved?. . .

> (4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement? . . .
>
> (5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved? . . ."

The Authority went on to state:

> "These considerations are not intended to constitute an all-inclusive list. As frequently noted in the opinions of various judicial and quasi-judicial entities, an adjudicative body must consider the totality of facts and circumstances in each case before it. Additional considerations will be applied where relevant and appropriate. Inasmuch as a ritualistic or mechanistic approach is neither suggested, nor contemplated, the Authority will expect the parties to cases of this nature filed in the future to address any and all relevant considerations as specifically as possible."

Applying the standards set forth by the Authority in National Association of Government Employees, Local R14-87, supra, and balancing the competing interests involved in the case herein, I conclude that Union Proposal 1 - "Each work station shall have no more than two (2) employees assigned to it," excessively interferes with management's right to determine the technology, methods and means of performing its work and accordingly is not negotiable.

Clearly determining the amount of space and the number of employees an agency will utilize to carry out its functions constitute matters involving management rights within the meaning of section 7106(b)(1) of the Statute. In my view, an essential consideration in this determination is how employees will be deployed in the work space allotted. Accordingly, I conclude the number of employees at each work station is directly related to the underlying determination regarding space and employee complement.

If work stations (desks and tables) were limited to occupancy as proposed by the Union, the terms of the proposal could ultimately impede Respondent from determining the total office space it needs to perform the work of the Agency. The MOWS system was implemented essentially to accommodate additional employees in existing office space. Obviously utilization of MOWS limits the amount of office space needed by Respondent with a corresponding limitation on the funds expended for this purpose. Field Agents' work particularly lent itself to sharing desks as they spend substantial portions of their time out of the office. At any given time most Field Agents might be out of the office, relatively equal numbers may be in and out of the office while on other occasions the majority or all Field Agents might be in the office. In addition, assigning two or three employees in the TIP group to the same table was part of the MOWS system in furtherance of utilizing the same total office space to accommodate additional employees in what Respondent obviously considered was a effective and efficient manner. Thus I conclude that determining the number of employees to be assigned to a particular desk or table was a matter intrinsically related to the manner or technology Respondent, in exercising its managerial judgment, chose to accomplish its work, given its decision to use current office space. Indeed, determining the number of employees at each work station goes to the essence of the MOWS concept.

With regard to the remaining Union proposals, I conclude all are negotiable under the criteria articulated by the Authority in National Association of Government Employees, Local R14-84, supra. Utilizing MOWS clearly adversely affected employees in the Atlantic City office in a significant manner. Thus, the evidence reveals more desks and employees were added to some offices, obviously resulting in a higher noise level, more congestion, substantial inconvenience in finding unoccupied work stations when primarily assigned locations were occupied and creating the necessity of making frequent trips to file cabinets when working in the office away from the assigned work station, as well as inconvenience created due to the proximity to a telephone. Given the requirement of confidentially, these and other conditions mentioned above resulting from using MOWS adversely affected the timely completion of work, a critical element in Revenue Agent's work standards as well as office morale.

After weighing the competing needs of Respondent by the introduction of MOWS and the effect on employees I find no excessive interference of these proposals on managements rights involved herein. Rather, the proposals leave the MOWS concept intact and merely concern themselves with ameliorating some of the adverse employment conditions which came about through MOWS.

Even prior to the Authority's holding in National Association of Government Employees, Local R14-84, supra, the Authority treated similar situations wherein matters generally concerning office design and related questions were at issue and found they did not concern the technology of performing agency work. The leading case in this area is American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 et al. and Library of Congress, 7 FLRA 578 (1982). In that case the Authority was called upon to determine the negotiability of various union proposals including among others, the following proposals submitted after the agency decided to relocate offices and adopted an open space design:

> "A.1. The Library agrees to provide each CRS employee with at least as much book shelf and file cabinet space as that employee currently possesses.
>
> "A.2. An employee's work or working conditions will not be negatively impacted by the Library's choice of office size, equipment or facilities.
>
> "A.9. To insure quiet and efficient working conditions each employee work station in open areas will be separated by padded, nonflammable partitions.
>
> "A.3. To insure quiet and efficient working conditions each analyst's office will be equipped with a door.
>
> "A.4. To insure quiet and efficient working conditions all two-person offices will have floor to ceiling partitions dividing the office."

The Library of Congress contended that each of these proposals were part of the technology of performing work and accordingly were nonnegotiable. In its decision the Authority stated:

> "The Agency's authority to determine "the technology . . . of performing work" is not defined in the Statute or the legislative history. Therefore, consistent with the purposes and meaning of the Statute and in the absence of any indication that the phrase as used in the Statute has a meaning other

> than its ordinary meaning, (citing Webster's Third New International Dictionary), the authority of the Agency to determine "the technology . . . of performing work" means the authority of the Agency to determine the technical method that will be used in accomplishing or furthering the performance of the Agency's work. Accordingly, it must be determined whether the record in this case supports the conclusion that any aspect of (the proposals in question) concerns the technical method that will be used in accomplishing or furthering the performance of the Agency's work."

In Library of Congress the Authority concluded all the above union proposals were negotiable, except for that portion of proposal A.2., above, dealing with "equipment and facilities"[12] After citing the agency's failure to establish that the matters sought to be negotiated constituted part of the technical method used by the agency for accomplishing or furthering the performance of its work or interfered with the purpose for which an open space approach to office design was adopted, the Authority concluded the proposals involved items merely incidental to the performance of the agency's work and were principally related to matters effecting working conditions of employees.

In a subsequent case, Internal Revenue Service, Chicago, Illinois, 9 FLRA 648 (1982), the Authority further explained its holding in Library of Congress supra, in matters dealing with office space design, stating:

> ". . . with respect to section 7106(b)(1), . . . an agency must demonstrate both that its choice of office space design has a technological relationship to accomplishing or furthering the performance of its work and that particular union proposals would interfere with the purpose for which the choice of office space design was adopted before there can be a finding that proposals concerning such choice would require the agency to negotiate on the technology of performing its work within the meaning of section 7106(b)(1)." (Emphasis added.)

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[12] The Authority held the "equipment and facilities" part of the proposal was only negotiable at the election of the agency since the proposal was stated in broad terms thereby requiring negotiations over all equipment and facilities, even those which constitute part of the technical method used by the agency to accomplish or further the performance of its work.

In a later case, *Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois*, 16 FLRA 141 (1984), the Authority, when finding a union's proposal concerning the procedure for assigning desks was negotiable, rejected an agency contention that the proposal was outside the duty to bargain because it conflicted with its right to determine the "technology" of performing work. In that case the Authority held that to sustain this contention ". . . an agency must show that its choice of office space design and its assignment of equipment and furniture has a *meaningful* technological relationship to the accomplishment and furtherance of its work and that the proposal in question would interfere with these purposes." Id. at 143. (Emphasis added.) The Authority further stated, ". . . assuming that the Respondent's choice of its office space design represents a determination regarding "technology" under section 7106(b)(1), the Respondent has not shown that the proposal would interfere with its determination in any *significant* way." Id. at 144. (Emphasis added.)

Turning now to the particular proposals at issue herein, and using the criteria articulated by the Authority in the *Library of Congress* line of cases, I find that Respondent has made no showing that any of the proposals, except for Proposal 1, has a meaningful technological relationship to the accomplishment and furtherance of the agency's work or would interfere with the purpose of which the MOWS system was adopted. Rather, I conclude these proposals relate to matters merely incidental to the performance of the agency's work and are principally related to matters concerning working conditions.

Indeed, proposals similar to those the Union herein sought to negotiate on have been found to be negotiable in numerous other cases previously decided by the Authority. Thus, regarding the Union's specific proposals:

Proposal 1. "Each work station shall have no more than two (2) employees assigned to it." To be sure, in prior cases matters involving desk assignments have been found by the Authority not to constitute the technology of performing the agency's work. Thus, in *United States Department of Justice, United States Immigration and Naturalization Service, Los Angeles, California*, 18 FLRA No. 72 (1985), a case involving an office reorganization, the Authority found negotiable a proposal "That management provide each Deportation Officer with a partitioned work area complete with a desk and telephone." In another case, *Internal Revenue Service, Chicago, Illinois*, 9 FLRA 648 (1982), the Authority found a union's proposal requiring the construction of private offices for various employees to be a negotiable matter, holding that office space design is not excepted from the duty to bargain under 7106(b)(1) of the Statute. However, in the case herein the number of people using a work station is an integral and necessary part of the system Respondent has adopted to perform its work. In order to preserve the MOWS system and to achieve its purpose of using existing office space to carry out its functions Respondent must maintain control over determining the number of employees who will share the various work stations. Accordingly, I find that Union Proposal 1, which would limit management's flexibility in this regard, is negotiable only at the election of Respondent under section 7106(b)(1)of the Statute and Respondent's refusal to bargain on this proposal did not constitute a violation of the Statute.

Proposal 2. "There will be no decrease in the number of telephones, calculators and paper cutters." In United States Department of Justice, supra, as stated above the Authority found negotiable a proposal wherein Deportation Officers would be provided with a partitioned work area complete with desk and telephone. Further, in Library of Congress, supra, the Authority found negotiable a proposal that "The Library agrees to provide each CRS employee with at least as much book shelf and file cabinet space as the employee currently possesses." Based upon the record herein I find Respondent has not established that such facilities have any meaningful technological relationship to accomplishing or furthering the performance of the agency's work within the meaning of section 7106(b)(1) of the Statute.

Proposal 4. "Employees will be assigned individual file cabinets to the maximum extent practicable. When more than one employee is assigned to a file cabinet, each will have a personal key." As with Proposal 2, above, I conclude this proposal is governed by the Authority's decision in United States Department of Justice, supra and Library of Congress, supra, and is negotiable within the meaning of section 7106(b)(1) of the Statute. Proposal 6. "Floor to ceiling partitions shall be utilized between each shared work station." Proposals concerning the installation of partitions have frequently been found not to concern the technology of performing work and therefore negotiable. Library of Congress, supra; United States Department of Justice, supra; and National Treasury Employees Union and NTEU Chapter 80 and Department of the Treasury, Internal Revenue Service, Control Region, 8 FLRA 197 (1982). Accordingly, I find this proposal is negotiable with the meaning of section 7106(b)(1) of the Statute.

Proposal 9. "Management will make every effort to install acoustical ceilings and/or sound masking systems to cut down on increased noise." Acoustical ceilings and sound masking systems are akin to partitions in the purpose they seek to achieve and accordingly I find the cases dealing with the negotiability of partitions are precedential to acoustical ceilingsand sound masking systems herein. Further, the Authority specifically found negotiable in National Treasury Employees Union and NTEU Chapter 80 and Department of Treasury, Internal Revenue Service, Central Region, supra; a proposal that a sound system of "white noise" shall be installed and utilized and a proposal requiring the installation of acoustical carpeting. Therefore I find this proposal is negotiable within the meaning of section 7106(b)(1) of the Statute.

Respondent also contends that the Union's Proposal 6 (utilizing partitions, supra) involved no change in a term or condition of employment so there arose no obligation to negotiate. This contention is rejected. With the creation of the TIP group requiring the relocation of employees and implementation of MOWS at the Atlantic City office the office arrangement clearly changed from one wherein no TIP group or MOW system existed to the present condition and, as found above, the use of partitions in these circumstances is a legitimate matter for negotiation.

I also reject Respondent's contention that it was not required to bargain on Union Proposal 7, since the matter is covered by the parties' National agreement. Proposal 7 states: "Work areas comply with all appropriate local and federal fire and safety provisions." In my view Article 21 of the National agreement, supra, does not preclude Proposal 7 from consideration. Article 21, does not speak to Respondent's compliance with local and federal fire and safety provisions and to assume that the language of Article 21 fully treats all matters of such compliance would be tantamount to finding a waiver of all rights to bargain on the matter. The Authority has repeatedly held that in order for a waiver of a bargaining right to exist, the waiver must be clear and unmistakable and I discern no such waiver on the facts of this case. See United States Department of Justice, supra, at 576. With regard to this issue, I also reject Respondent's contention that no evidence exists that local negotiations on health and safety issues are cognizable under the National agreement. Article 39, Section 3B of that agreement, supra, clearly envisions when local changes in working conditions are made, they will be negotiated on the local level.

Turning now to Respondent's contention that the impact of the implementation of MOWS on unit employees at the Atlantic City Post Duty was de minimis and therefore imposed no duty to bargain on Respondent, the Authority held in Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174 (1984) that "no duty to bargain arises from the exercise of a management right that results in an impact or reasonably foreseeable impact on bargaining unit employees which is no more than de minimis." In assessing whether an impact or reasonably foreseeable impact exists the Authority indicated it will look to the totality of the facts and circumstances and, in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 (1985), the Authority considered the nature of the change (extent and duration), the number of employees affected or foreseeably affected, the size of the bargaining unit, and established procedures and arrangements concerning past analogous changes. The Authority added however that evaluation of these factors should were not to be mechanistic and other applicable considerations must be examined. The Authority also applied the above factors in Department of the Treasury, Internal Revenue Service and its Cleveland, Ohio District Office, 20 FLRA No. 43 (1985), (herein IRS, Cleveland), a case wherein the adverse impact of implementing the MOWS concept was at issue in the Toledo office of the Cleveland District Office. In that case the agency in 1983 partially implemented its 1981 decision to go to a MOWS office concept by replacing desks with tables. The union had been given an opportunity to negotiate on impact and implementation of the plan in 1981 at which time it waived its right to bargain. The Authority, reversing the Administrative Law Judge's conclusion that the agency refused to negotiate in 1983 on the impact and implementation of the change, held, inter alia:

> "The adverse effects discussed by the Judge are effects associated with work in a more cramped work space. These effects arose primarily from Respondent's decision, in 1981, to go to the MOWS concept. Thus, the nature and degree of the impact of the change in 1983 did not differ from the impact that was foreseeable when Respondent developed its plan in 1981 . . ."

Thus IRS, Cleveland, is distinguishable from the case herein on the facts. However, in that case the Authority went on to state:

> "In addition, the Authority notes that the Toledo office involved herein is but one of three offices in the Cleveland District and that this district is but one of 60 district offices covered by the parties' national agreement. Thus, when considered against the substantially larger number of employees exclusively represented in the nationwide consolidated unit, the number of employees affected by the change involved herein was relatively small . . . ."

Accordingly, although from the totality of the facts and circumstances, I conclude that in the case herein the impact of implementing MOWS in Atlantic City is substantial, i.e., more then de minimis, one of the factors which must be independently considered when determining the impact of implementing MOWS is the number of employees affected by the change vis a vis the substantially larger number of employees in the nationwide unit of which the Atlantic City Post of Duty is a part. As pointed out by Respondent in its brief when urging a finding of de minimis impact, "The Atlantic City post-of-duty occupies an equally small role in the Newark District" to that of the Toledo office in the Cleveland District in IRS, Cleveland, supra. This contention cannot be denied. The evidence discloses that the change to MOWS at Atlantic City affected approximately 29 employees - 12 members of the TIP group and about 17 field agents. Nevertheless, Respondent's April 6, 1984 letter to Chapter President Weiner, supra, reveals that Respondent was conducting a study as a first step to implement MOWS ". . . for all Revenue Officer and Revenue Agent field groups." The letter acknowledged already using MOWS in the Camden, Mountainside, Newark, New Brunswick and Paterson offices. IRS, Cleveland, supra, reveals MOWS already operational, at least in part, in the Toledo office of IRS. Thus, if Respondent's contention is correct, if it implement's MOWS incrementally on an office by office basis, which would effect only a small number of employees at each office as compared to the size of the nationwide unit, Respondent could, using this factor as a basis, circumvent an obligation to bargain on a substantial change in working conditions. The matter would be seen as a local condition and local matters are negotiable at that level under the agreement, supra.

In the case herein we have evidence that Respondent envisions possibly implementing MOWS at all offices in the Newark District at some undisclosed future time, depending upon the outcome of its study. I find this to be a significant factor and, as the implementation of MOWS at Atlantic City is but part of a larger plan which can affect substantial but unknown numbers of unit employees in the District, I conclude the number of unit employees in the Atlantic City office compared with the size of the nationwide unit is immaterial to a determination of whether the impact is de minimis and reject Respondent's contention that the impact occasioned by implementing the MOWS system at the Atlantic City office was de minimis and the Complaint should be dismissed.[13]

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[13] Indeed, I urge the Authority to reconsider the use of this factor when deciding whether the impact of an otherwise bargainable change in working conditions is negotiable because of

(continued)

Remedy

Counsel for the General Counsel requests that in addition to posting an appropriate Notice to Employees, Respondent be ordered to bargain on the Union's September 1984 proposals and be required to give retroactive application to any agreement reached to the maximum extent possible.

With regard to the Union's proposals, Respondent conceded to the Union by letter of November 11, 1984 that Proposals 3, 5 and 8 were negotiable and I make no findings on these proposals since the matter was not before me. Accordingly, when specifically mentioning proposals in my recommended order I will allude only to the proposals at issue herein.

As to giving retroactive application to any agreement subsequently reached by the parties, such a remedy is inappropriate in the circumstances of this case. Federal Aviation Administration, Washington, D.C., 19 FLRA No. 59 (1985), specifically adopting the following rationale explicated to reject imposition of such a remedy in Internal Revenue Service (District Region, National Office Units), 16 FLRA 904 (1985), at 924:

> ". . . in this particular case it is entirely possible that the parties will eventually find themselves before the FSIP for resolution

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13/ (continued)

de minimis effect. But for the letter of April 6, 1984, supra, being put in evidence, we would not know the extent of Respondent's intent to implement MOWS throughout the Newark District. It is quite possible, judging from this and IRS, Cleveland, supra, that implementation of MOWS may be occurring in specific offices all over the country on a office by office basis without local union negotiators knowing the state of affairs outside their districts.

Other situations may well exist wherein a reorganization of some sort occurs limited to small groups of employees and local union negotiators are without knowledge of management's more widespread intent and have no practical way of obtaining such information. Thus, a piecemeal change in working conditions can incrementally affect substantial numbers of employees without an agency having to meet its statutory obligations to bargain over such changes.

> of a bargaining impasse. In that event the FSIP would appropriately consider such a proposal and an order herein requiring retroactive application would limit the requisite flexibility and impair the broad range of options the FSIP necessarily requires to execute its statutory functions. Accordingly, the Union's request for retroactive application is denied."

Accordingly, in view of the entire foregoing I conclude Respondent violated section 7116(a)(1) and (5) of the Statute when on, November 11, 1984, and at all times thereafter, refused to bargain with the Union on Union Proposals 2, 4, 6, 7, and 9 as set forth in Chapter 60 President Weiner's letter of September 18, 1984 to Resources Management Chief Bello, and I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Newark District Office shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate in good faith with National Treasury Employees Union, its employees' exclusive collective bargaining representative, by declaring non-negotiable Proposals 2, 4, 6, 7 and 9 made by National Treasury Employees Union, Chapter 60, on September 18, 1984, concerning implementation of multiple occupancy work stations (MOWS) at the Atlantic City Post of Duty.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request of National Treasury Employees Union, the employees' exclusive collective bargaining representative, negotiate, to the extent consonant with law and regulations, concerning the implementation of multiple occupancy work stations (MOWS) at the Atlantic City Post of Duty.

(b) Post at its Atlantic City Post of Duty copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commissioner, Internal Revenue Service, or his designee, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director of Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: March 17, 1986
Washington, D.C.

[2-CA-50074]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate in good faith with National Treasury Employees Union, our employees' exclusive collective bargaining representative, by declaring nonnegotiable Proposals 2, 4, 6, 7 and 9 made by National Treasury Employees Union, Chapter 60 on September 18, 1984.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request of National Treasury Employees Union, our employees' exclusive collective bargaining representative, negotiate, to the extent consonant with law and regulations, concerning the implementation of multiple occupancy work stations (MOWS) at the Atlantic City Post of Duty.

____
(Agency or Activity)

By: ______________________________
(Signature)

Dated: ____________________

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

9-3/No. 59

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 59

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

May 27, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 1-CA-50091 (May 20, 1986)

Department of Transportation, Federal Aviation Administration and National Federation of Federal Employees

Case Nos. 2-CO-50025 and 2-CO-50026 (May 23, 1986)

American Federation of Government Employees, AFL-CIO, Local 2567, Defense Logistics Agency, Defense Contract Administration Services, New York Region and Lorraine M. Podraza, An Individual and American Federation of Government Employees, AFL-CIO, Local 2567, Defense Logistics Agency, Defense Contract Administration Services, New York Region and Robert M. Baggan, An Individual

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y3.F31/21-3:

(1-CA-50091)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Respondent

and

Case No. 1-CA-50091

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on March 17, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., May 20, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

(1-CA-50091)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Respondent

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES
Charging Party

Case No. 1-CA-50091

Gary W. Baldwin
Allen M. Goldsher
For the Respondent

Carol Waller Pope
Daniel F. Sutton
For the General Counsel
Federal Labor Relations Authority

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 *et seq.*, 92 Stat. 1191, hereinafter referred to as the Statute and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410, *et seq*.

A charge was filed on November 21, 1984 by National Federation of Federal Employees, hereinafter called NFFE, against Department of Transportation, Federal Aviation Administration, hereinafter called FAA. Pursuant to the foregoing charge the General Counsel of the FLRA by the Director of Region I issued a Complaint and Notice of Hearing on April 19, 1985 alleging in paragraph 5, that FAA interfered with, restrained and coerced its employees by refusing to let an employee employed in the FAA Windsor Locks facility engage in solicitation and/or distribution on behalf of NFFE during nonwork time in nonwork areas at FAA's Logan Tower and Boston Center and by maintaining a policy which prohibits employees from one facility from engaging in protected union activity in nonwork areas during nonwork time at other facilities. FAA filed an Answer, denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in Boston, Massachusetts. Respondent and the General Counsel of the FLRA were represented. At the hearing the Complaint was amended so as to allege that the conduct set forth in Complaint violated Section 7116(a)(1) of the Statute. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of witnesses and their demeanor, and my evaluation of the evidence I make the following:

Findings of Fact

FAA operates a nationwide system of air control operations. FAA New England Region is comprised of the FAA facilities throughout the six New England States, including Logan Airport Tower in Boston, Massachusetts, Bradley Airport Tower in Windsor Locks, Connecticut and the Boston Center in Nashua, New Hampshire.

Air traffic controllers routinely visit FAA facilities throughout the nation on both duty and off duty time. Air Traffic Controllers visit facilities other than those to which they are assigned on off duty time for a variety of reasons including personal visits with friends, tours of the operational facility, seeking employment opportunities and use of nonwork areas during layovers caused by air travel delays. The extent and nature of these visits vary depending on the personal circumstances of the individual employee, including staying in the break area for many hours between flights.

Generally, visiting off duty controllers seeking access to a facility present themselves to a management official, identify themselves and state the general purpose of their visit. Access is routinely granted.[1] Escorts are routinely provided to visiting controllers while touring the operational areas but these escorts do not routinely remain with visiting controllers in nonwork areas. On the contrary, visiting controllers are routinely unescorted when in nonwork areas and are free in such nonwork areas to talk to other controllers with no restrictions placed on the subjects of the discussions. During controllers visits to FAA facilities while in nonduty status controllers have visited the nonwork areas for varying lengths of time, including staying in the break room over night while awaiting a flight during personal travel.

During the prior year or two labor organizations have begun attempts to organize air traffic controllers.[2] During October of 1984 American Federation of Government Employees, AFL-CIO (AFGE) filed a representation petition with the Federal Labor Relations Authority seeking to represent air traffic controllers at Bradley Tower and latter amended to include all air traffic controllers employed in FAA's New England Region. _Department of Transportation, Federal Aviation Administration, Atlantic City Air Traffic Control Tower_, 20 FLRA 225 (1985).

A memorandum dated April 9, 1984 from FAA's Director of Labor Relations E. V. Curran, was issued to FAA regional offices, which set forth FAA's policy concerning management responsibilities during an organizational campaign. The memorandum provided, _inter alia_:

> "The following guidance serves as a reminder of our obligations during an organizing campaign by AFGE or any other organization and should be communicated to air traffic managers and supervisors.
>
> a. Supervisors must remain neutral with regard to employee rights to form, join or assist a labor organization, or refrain from engaging in such activities.

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[1] The record contains no evidence of a visiting controller being denied access to a FAA facility _except_ the subject incident involving Air Traffic Controller Joseph Perrone being denied access to Logan Airport Tower and the Boston Center.

[2] In 1981 the Professional Air Traffic Controllers Organization was decertified as the collective bargaining representative of the air traffic controllers. _Professional Air Traffic Controllers Organization, AFL-CIO_, 7 FLRA 10, 7 FLRA 34 (1981); remanded on other grounds 672 F.2d 109 (D.C. Cir., 1981); affirmed 685 F.2d 547 (D.C. Cir., 1982).

> b. Employees are entitled to distribute literature in nonwork areas during nonwork time.
>
> c. Nonemployee representatives of the the union will not be given access to Federal Aviation Administration (FAA) facilities to conduct organizing activities.
>
> d. Supervisors should not interfere with the normal give-and-take of conversation between employees solely because the subject is union activity.
>
> e. Employees may post union literature on nonofficial bulletin boards which are generally used by employees to post notices that are not work related. However, managers should remove any material which is scurrilous or inflammatory. The use of other agency facilities, including the internal mail system, will not be permitted.
>
> These guidelines are, of course, subject to change as future circumstances may dictate. Please keep us informed of any organizing activity within your region."

At all times material Joseph Perrone has been employed by FAA as an Air Traffic Controller at the Bradley Airport Control Tower, Windsor Locks, Connecticut. During October 1984 Perrone became involved in organizing activities, including the distribution of literature and solicitation of employee signatures at the Bradley Tower on behalf of NFFE.

On or about October 31, 1984 Perrone telephoned FAA officials at FAA's Logan Airport Tower in Boston and the Boston Center in Nashua, New Hampshire. In his call to Logan Tower Perrone spoke to Paul Johnston, then Acting Manager of the Boston Tower and Assistant Manager of Training. Perrone identified himself as an FAA Air Traffic Controller assigned to Bradley Tower and requested access to the break room,[3] a nonwork area at Logan Tower to talk to employees and to solicit signatures on behalf of

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[3] The break room at Logan Tower is physically separate from the operational (work) area and functions as a lunch room, with a stove and refrigerator for employee use. It is reached by going through an operational area.

NFFE. Johnston told Perrone that Perrone would not be granted access to the Logan tower because Perrone's purpose for coming was not a permissible activity. In denying access to Perrone, Johnston was apparently relying on the FAA April 9, 1984 Memorandum and on briefings held in September and October 1984.

In the call to the Boston Center Perrone made a similar request and was advised by an FAA official[4] that Perrone would not be granted access to the break area[5] for the purpose of solicitation/distribution on behalf of NFFE.

Perrone disagreed with the decisions concerning access to the Logan Tower and Boston Center and therefore telephoned Richard Fischer, FAA's Chief of the Labor Relations Branch at the New England Regional Office. Fischer advised Perrone that Perrone's requests to visit the Logan Tower and Boston Center for the purpose of solicitation and distribution were approved but that Perrone must remain in nonwork areas.

At about this same time Steven Kreisberg, NFFE Northeastern Division Director, called Raymond B. Thoman, then FAA Manager of the Union/Management Relations Division in the Office of Labor Relations. Kreisberg advised Thoman that Perrone was entitled to the same rights to organize at Logan Tower and Boston Center as employees assigned to those facilities. Thoman disagreed and stated that for the purpose of distribution of literature or solicitation of signatures Perrone was not an employee of the Logan Tower or the Boston Center. Thoman relayed the same information to Fischer.

During the morning of November 1, 1984 Fischer was unable to contact Perrone so he asked Johnston to advise Perrone of the decision that Perrone would not be granted access for the specific purpose of solicitation or distribution on behalf of NFFE.

Thereafter on November 1, 1984 Perrone arrived at the Logan Tower and was told by Johnston that he had been advised that morning that Perrone was not to be allowed access to the facility

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4/ Although the substance of the conversation is not in dispute, there is some confusion whether Perrone spoke to Ray German, Acting Assistant Manager of the Boston Center, or James A. Candle, Air Traffic Manager of the Boston Center.

5/ The break room at the Boston Center in Nashua, New Hampshire is a cafeteria located 1 1/2 floors below the operational area.

for the purpose of distributing literature and soliciting signatures. Johnston suggested that Perrone might wish to distribute literature and solicit signatures at a public garage adjacent to the facility where Perrone would have access to controllers, among others, reporting and leaving work. Perrone asked Johnston if Perrone could solicit signatures and distribute literature in a hall outside the FAA radar room; the hallway is a public way controlled by the Massachusetts Port Authority. Johnston agreed and Perrone remained in the public hallway from about 1:30 p.m. to 5:00 p.m, where he had access to controllers who arrived at or left the tower and radar room. Controllers arriving at work had to sign in and in so doing had to pass Perrone. Perrone spoke to about 10-15[6] controllers while engaging in the NFFE organizing effort.

While at the Logan Tower Perrone was told he had a call from German. Perrone declined to speak to German when advised that Perrone's request for access to the Boston Center for the purpose of solicitation and distribution would be denied.

The following day, November 2, 1984 after leaving a message, Perrone was called by Candle who advised Perrone that he could not come to the Boston Center or the outside grounds for the purpose of soliciting signatures and distributing literature on behalf of NFFE. Candle told Perrone that Perrone could tour the Boston Center, as any other FAA employee, with access to nonwork areas and to other employees but, although Perrone could discuss NFFE, be could not remain in the cafeteria or on the FAA grounds for the sole purpose of talking to employees in order to solicit signatures and distribute literature for NFFE. Candle stated that if Perrone remained in the cafeteria and talked about NFFE Perrone would be asked to leave. Candle explained that FAA policy was not to let outside agents of a union use an FAA facility to organize controllers and that the FAA policy was not to give one organization preferential treatment to have access to controllers if it couldn't be given to everybody. In light of foregoing discussion Perrone decided not to travel to the Boston Center.

Since November 2, 1984 Perrone has been granted access to several FAA facilities for personal visits to see friends but not to act on behalf of NFFE.

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[6] Johnston testified there were 16 controllers assigned to Logan Tower day shift, 6 assigned to the tower and 10 to the radar room.

Discussion and Conclusions

The General Counsel of the FLRA contends that FAA's prohibition of solicitation and distribution on behalf of a labor organization by employees at facilities other than where assigned is overly broad and discriminatory and in violation of Section 7116(a)(1) of the Statute. FAA contends that an employee assigned to one FAA facility does not have the same rights to distribute literature or solicit signatures on behalf of a union at another facility as an employee assigned to that other facility.

Section 7102 of the Statute provides that each employee has the right "to form, join or assist any labor organization, or to refrain from such activity, . . ." the FLRA has held that inherent in such right to self organization is the right to engage in distribution of literature and solicitation of signatures on behalf of a labor organization and to engage in this conduct, absent unusual circumstances, during nonwork times in nonwork areas. *Social Security Administration*, 13 FLRA 409 (1983)7/ and *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 6 FLRA 159 (1981). This same rule has long applied in the private sector *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). In the private sector a distinction has been drawn however between the rights of employees to solicit signatures and distribute literature on behalf of a union and the rights of nonemployees. With respect to the latter it has been held that an employer did not interfere with employees rights when it refused to permit a nonemployee onto its property where there were other reasonable means for the union to communicate with employees. *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 113 (1956).8/

In the subject case the General Counsel of the FLRA contends that Perrone is an FAA employee and therefore Section 7102 of the Statute secured his right to distribute literature and solicit signatures for NFFE during nonwork time and in nonwork areas of

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7/ This case involved employees during nonwork time who, as a matter of practice, ate and talked in their work areas.

8/ Prior to enactment of the Statute the Assistant Secretary of Labor found the restriction of access to property by nonemployees to be governed by rules similar to those in the private sector. *Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts*, A/SLMR No. 263, 3 A/SLMR 193, 196 (1973).

all FAA facilities, including the ones to which he is not assigned. Therefore, General Counsel of the FLRA urges that FAA's policy which forbids such activity by Perrone in FAA installations to which he is not assigned, interferes with Perrone's rights set forth in Section 7102 of the Statute and violates Section 7116(a)(1) of the Statute.

FAA contends that, with respect to those FAA installations to which he is not assigned, Perrone is similar to a nonemployee and therefore the limitations on his activities are not unwarranted interferences with Perrone's rights guaranteed by Section 7102 of the Statute.

The FLRA has not specifically addressed the situation presented herein. In the private sector, the National Labor Relations Board (NLRB) has dealt with the situation of access to premises by off-duty employees, a somewhat analogous situation to the one in the subject case.

The NLRB held that a rule that prohibited off-duty employees from entering or remaining on the premises for _any_ reason did not violate the National Labor Relations Act, hereinafter called the Act. _GTE Lenkurt, Inc._, 204 NLRB 921 (1973). In that case the rule did not mention union solicitation and there was no evidence that off-duty employees had been allowed on the employer's premises for any purpose. The NLRB, in finding no violation of the act, stated that the nonaccess rule was nondiscriminatory "i.e. it denies off-duty employees access to the premises for any purpose and is not disparately applied against union activities." _GTE Lenkurt, Inc._, _supra_ at 922. In _Litho Press of San Antonio_, 211 NLRB 1014 (1977), enf:d 512 F.2d 73 (CA 5, 1975) the NLRB distinguished _GTE Lenkurt, Inc._, _supra_, and concluded that a no distribution and solicitation rule applied to an employee on vacation status violated the Act because it specifically limited access to the premises by off-duty employees for "union talk" and therefore was disparately applied. In _Tri-County Medical Center, Inc._, 222 NLRB 1089 (1974) concluded, in holding the employer had violated the Act, that a nonaccess rule is valid only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. _Tri-County Medical Center, Inc._, _supra_.

The NLRB found further that an employer denial to off-duty employees of entry to parking lots, gates and other outside nonworking areas was invalid under the Act. _Tri-County Medical Center, Inc._, _supra_.

In considering the subject case the NLRB decisions, although not binding, should be considered and weighed. See *American Federation of Government Employees, AFL-CIO v. FLRA*, ______ F.2d ______, Case No. 85-1004 (CADC, March 11, 1986).

In its decisions the FLRA has tried to strike a balance between an employee's right to form or assist a labor organization and management's duty to perform its work without undo interference. In this regard the considerations in the private sector are somewhat different than those in the public sector. In the private sector the employer not only has the right to operate its business without undo interference, it also has a proprietary interest in the property it controls. By lease or ownership, the employer in the private sector has a private property interest in its premises and accordingly some right to control it. In the public sector the premises are not private and an agency has no inherent proprietary interest in the property, but merely must control the property so that it can effectively perform its duty and preserve the public property as part of its public trust. The private sector employer has an interest and right to the control of its own property whereas the public sector employer's only interest is in controlling the property so that the work of the agency is performed with minimum interference and as a steward for the public. Thus, in the public sector, under the Statute, there is less of a reason to limit the rights of off-duty employees, or of employees assigned to a facility different from the one at which solicitation is to take place, than there is in the private sector. Accordingly, I conclude that the NLRB reasoning does not apply to the public sector.

In light of the foregoing, therefore, I conclude that FAA's rule which was applied to Perrone, an FAA employee, was too broad and unduly interfered with his rights guaranteed by Section 7102 of the Statute to assist NFFE in its organizing campaign. The rule therefore violated Section 7116(a)(1) of the Statute. In so concluding I find that FAA failed to establish that Perrone's activity would have interfered with FAA's performance of its duties. In this respect I note that controllers, both on duty and off duty, regularly visit FAA facilities other than the one to which they are assigned, and some such visiting controllers spend extended periods of time in the nonwork areas. The presence of such visiting controllers have apparently not been disruptive. Further I note that the FLRA found with respect to controllers that the FAA is very highly integrated on a national level with a great amount of movement among the various FAA facilities. The FLRA, in so finding, concluded that regional integration was in fact merely part of a nationwide highly integrated operation and that apparently a nationwide unit of controllers would be the sole appropriate unit. Department of Transportation, Federal Aviation Administration, Atlantic City Air Traffic Control Tower, 20 FLRA 225 (1985). An employee, therefore, has a real interest in campaigning for a labor organization and otherwise exercising his Section 7102 rights at FAA facilities all over the country. Limiting such a controller to the facility to which he is assigned, would unduly prevent him from assisting a labor organization throughout the collective bargaining unit.

Accordingly, in balancing employee rights granted by the Statute with FAA's interest in preventing access to nonwork areas by visiting controllers, I find the employee interests prevail and employees should be permitted to solicit/distribute for a union in facilities other than one to which the employees are assigned.

Thus, I conclude, FAA's rule which prevents employees from solicitation and distribution on behalf of a union in nonwork areas in facilities to which they are not assigned is an undue interference with employees' rights guaranteed by Section 7102 of the Statute and therefore violates Section 7116(a)(1) of the Statute.

However, even if the FLRA were to adopt the narrower NLRB rule concerning off-duty employees, the FAA's rule in the subject case constitutes a violation of Section 7116(a)(1) of the Statute. Thus, in the subject case, the rule limiting solicitation and distribution applied only to union activity and, in practice, air traffic controllers regularly travel to facilities to which they are not assigned and visit therein the nonwork areas and talk and discuss many things. Pursuant to the FAA rule, the only thing such a visiting controller is forbidden to do, is to engage in solicitation and distribution on behalf of a union. The rule, therefore was clearly disparately applied. Further, the rule, as applied to Perrone, prevented him from campaigning in a nonwork outdoor area at the Boston Center. See Tri-County Medical Center, Inc., supra.

Having found that FAA violated Section 7116(a)(1) of the Statute by maintaining and applying an unlawful no distribution and solicitation rule, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby Orders that the U.S. Department of Transportation, Federal Aviation Administration (Washington, D.C.), shall:

1. Cease and desist from:

(a) Promulgating, maintaining, or enforcing any directive, regulation, or rule which prohibits or prevents Joseph Perrone or any other employees, during nonwork time, from distributing literature and soliciting, signatures from any other employees for membership on behalf of the National Federation of Federal Employees, or any other labor organization, in nonwork areas in any facility.

(b) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise of any right under the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at all its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official of the Federal Aviation Administration and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: March 31, 1986
Washington, D.C.

(1-CA-50091)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT promulgate, maintain, or enforce any directive, regulation, or rule which prohibits or prevents Joseph Perrone or any other employees, during nonwork periods from distributing literature and soliciting, signatures from any other employees, for membership on behalf of National Federation of Federal Employees, or any other labor organization in nonwork areas in any facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of their rights assured under the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116 and whose telephone number is: (617) 223-0920.

(2-CO-50025; 2-CO-50026)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2567,
DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES, NEW YORK REGION

Respondent

and

Case No. 2-CO-50025

LORRAINE M. PODRAZA, An Individual

Charging Party

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2567,
DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES, NEW YORK REGION

Respondent

and

Case No. 2-CO-50026

ROBERT M. BAGGAN, An Individual

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on April 11, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., May 23, 1986.

Harold D. Kessler
Director of Case Management

(2-CO-50025; 2-CO-50026)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2567,
(DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES, NEW YORK REGION)

Respondent

and

LORRAINE M. PODRAZA, An Individual.

Charging Party

Case No. 2-CO-50025

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2567,
(DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES, NEW YORK REGION)

Respondent

and

ROBERT M. BAGGAN, An Individual

Charging Party

Case No. 2-CO-50026

Allan Stadtmauer, Esquire
For the General Counsel

Mr. Nathan Goods
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to separate amended charges first filed on August 23, 1985, by Lorraine M. Podraza and Robert M. Baggan, respectively, a Consolidated Complaint and Notice of Hearing was issued on November 29, 1985, by the Regional Director for Region II, Federal Labor Relations Authority, New York, New York. The Consolidated Complaint alleges in substance that Local 2567, American Federation of Government Employees, AFL-CIO, (hereinafter called the Respondent or Local 2567), violated Sections 7116(b)(1) and (8) of the Federal Service Labor-Management Statute, (hereinafter called the Statute), by failing and/or refusing to properly represent Ms. Podraza and Mr. Baggan in their respective grievances concerning failure of the Defense Contract Administration Services, New York Region, (hereinafter called the DCASR, NY), to secure them hazardous duty or environmental differential pay for certain hazardous duty. The Consolidated Complaint further alleges that Local 2567 committed an independent violation of Section 7116(b)(1) when it coerced Mr. Baggan into giving testimony, contrary to "his express desire not to provide same" in an unfair labor practice proceeding in which Local 2567 was the charging party.

A hearing was held in the captioned matter on January 13, 1986, in New York, New York. All parties were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on issues involved herein. The General Counsel submitted a post-hearing brief on February 13, 1986, which has been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact,[1] conclusions and recommendations.

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[1] The facts are not in dispute. Respondent's witnesses did not attempt to rebut the testimony of the Charging Parties, but rather offered only justification for their alleged discriminatory actions. Although Respondent in its answer to the consolidated complaint urged dismissal of the consolidated complaint as being untimely, during the hearing it offered no evidence in support of such allegation, nor did it renew its position.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (hereinafter called AFGE) "is the certified exclusive representative of a nationwide consolidated unit of all professional employees and a nationwide consolidated unit of non-professional employees within the Defense Logistics Agency, U.S. Department of Defense, . . . including employees of the Defense Contract Administration Services, New York Region (DCASR, NY." At all times material herein Local 2567, the Respondent herein, has acted as agent of AFGE in labor relations matters relating to the employees of (DCASR, NY).

At all times material herein the AFGE and the Defense Logistics Agency were parties to a master labor agreement dated October 10, 1983. At all times material herein the Respondent and (DCASR, NY) were parties to a Supplement to the Master Labor Agreement. Both the Master Labor Agreement and the Supplement to the Master Labor Agreement contained grievance procedures which were applicable to all unit employees, including Ms. Podraza and Mr. Baggan, the charging parties herein.

The Defense Logistics Agency (DLA) performs substantially the same functions and services for the Department of Defense as the General Services Agency performs for the civilian departments of the Government. Among the programs administered by DLA is the Precious Metals Recovery Program which involves the recovery of precious metal from government property by independent contractors. To insure that there is no pilferage, DLA employees are generally assigned to the contractor's premises in order to make sure that the contract was being carried out properly.

The instant case involves contracts let to Crown Bullion and Smelting Corporation and U.S. Metals Corporation under the Precious Metals Recovery Program. It appears that both corporations were located in the New Jersey area and therefore fell within the jurisdiction of DCASR/NY, the employees of which, were serviced by Local 2567, the Respondent herein. Mr. Raymond Nazare and Mr. Peter Campisi are vice presidents of Local 2567 and in such capacity are authorized, among other things, to process grievances.

On or about September 24, 1984, Mr. Baggan, an Industrial Property Management Specialist, began work at DLA's Defense Contracts Administration Management Area, a sub-command of the Defense Contract Administration Services Region, New York (DCASR/NY), located in Springfield, New Jersey. His primary duties while in Springfield were to monitor contractors in the performance of various contracts and to make sure that government property was protected and used according to the terms of the contract. During the period from late September 1984 until June 1985 he monitored the recovery of precious metals from government materials at basically two smelters, Crown Bullion and Smelting Corporation and U.S. Metals Corporation.

Beginning on or about September 27, 1984, Mr. Baggan was assigned to work with Ms. Podraza, an Industrial Specialist, who was in charge of the government contract with Crown Bullion and Smelting Corporation. Ms. Podraza had been employed by DCASR/NY for about seven years. From the outset of the government contract with Crown Bullion both Mr. Baggan and Ms. Podraza were subjected to unsafe and unhealthy conditions without proper respiratory and safety equipment. Throughout October and November, 1984 they complained about their working conditions to their immediate supervisor and urged their Regional Office to conduct safety and health inspections. Additionally, Ms. Podraza asked the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) to make an independent inspection of the premises. OSHA's subsequent inspection was instrumental in causing DCASR/NY to conduct a meeting on November 16, 1984 among interested unit and non-unit employees to discuss the safety and health problems associated with the metal recovery contractors. Mr. Baggan did not attend this meetings. The Union subsequently was also asked to become involved in the safety and health matters relating to the smelters. To this end Ms. Podraza and Mr. Baggan met with representatives of Local 2567 on November 21, 1984. While a great deal of attention was paid to the actual safety and health problems, little or no attention was paid to eligibility of employees for hazardous duty pay, the filing of grievances, or the negotiated grievance procedure.

By memorandum dated December 10, 1984 Mr. Baggan and Ms. Podraza, after determining that they were entitled to hazardous duty pay or environmental differential pay, individually filed requests through management channels for hazardous duty pay and environmental differential pay. On December 21, 1984 Ms. Podraza and Mr. Baggan submitted a follow-up memorandum on their original requests for hazardous duty pay and environmental differential pay from management. Attached to the follow-up memorandum were the OSHA reports which had been acquired from that agency on or about December 19, 1984. On the same date Mr. Baggan and Ms. Podraza jointly filed a memorandum with Mr. Nazare of Local 2567 which invoked the grievance procedure.[2] The grievance was filed because management had not responded to any of their requests for hazardous duty pay and environmental differential pay.

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[2] Although Ms. Podraza and Mr. Baggan were members of the unit they were not members of AFGE local 2567, the unit representative.

On receipt of the grievance on December 21, 1984, Mr. Nazare, a Vice President of Respondent, told Mr. Baggan that the grievance was not on the appropriate form. Mr. Nazare gave Mr. Baggan the correct forms but, because Christmas leave was imminent, it was agreed that Mr. Baggan and Ms. Podraza would re-file them after their return from holiday leave. Along with the December 21st memorandum, Mr. Baggan provided the Union with copies of an OSHA Report which he and Ms. Podraza had obtained to support their claims for hazardous duty pay and environmental differential pay.

Subsequent to his return from holiday leave, on January 4, 1985 Mr. Baggan dropped off his corrected grievance for hazardous duty pay at Crown Bullion at the Local 2567 office.[3] He gave it to Mr. Nazare who told him that he was accepting the grievance and that he (Mr. Nazare) would proceed with it. Mr. Nazare explained the grievance procedure to Mr. Baggan and told him that it was important to proceed through each of the steps prior to invoking arbitration, if arbitration was found to be necessary. As noted above, the grievance was filed by Mr. Baggan because management had failed to respond at all to his (and Ms. Podraza's) requests for hazardous duty pay and environmental differential pay. Mr. Baggan sought as a remedy the payment of hazardous duty pay. Mr. Nazare did not discuss the timeliness of the January 4, 1985 grievance with Mr. Baggan. On January 7, 1985, Ms. Podraza submitted her grievance to Local 2567. Her grievance was hand-carried to the union office by Mr. Baggan.

From on or about January 4, 1985 until February 8, 1985 no action on the Crown Bullion grievance was taken by Local 2567. By this time Mr. Baggan was working on a daily basis at a second precious metal recoverer, U.S. Metals Corp. According to Mr. Baggan, U.S. Metals was worse in terms of safety and health than Crown Bullion.

By memorandum dated February 7, 1985, Mr. Baggan, along with another employee, submitted a request to management for hazardous duty pay. On or about February 8, 1985, Mr. Baggan visited Local 2567's office and filed a grievance concerning hazardous duty pay at U.S. Metals Corp. with Mr. Nazare. On this occasion, after he had a heated discussion with Mr. Nazare about Local 2567's apparent inactivity on his pending grievance, Mr. Baggan demanded immediate attention to the steps of the grievance procedure. Mr. Nazare reluctantly contacted Chief Steward Peter D. Campisi and instructed Mr. Campisi to hold a first step meeting on the grievances. Mr. Campisi immediately arranged for a first step meeting at the Local 2567's office. Chief of Property Robert Burke, Mr. Campisi, Mr. Baggan and Mr. Nazare held a four-way meeting and discussed hazardous duty pay. Although he acknowledged that Mr. Baggan was entitled to hazardous duty pay, Mr. Burke was not able to grant the relief sought by Baggan. Mr. Burke stated that he had no authority to grant the relief because the decision was being made at a higher level. Mr. Baggan was under the impression that this meeting was being held for purpose of dealing with both of his grievances. However, the record indicates that Mr. Campisi knew nothing about the earlier Crown Bullion grievances of Mr. Baggan and Ms. Podraza and that as far as he was concerned they were only dealing with the U.S. Metals Corp. grievance which had just been filed. As a matter of fact prior to the U.S. Metals grievance, Mr. Campisi had had no contact whatever with Mr. Baggan or Ms. Podraza concerning grievances. He had attended meetings regarding safety and health at which one or the other of them was present but had not handled grievances for either of them. Inasmuch as he had not handled any earlier grievances he denied any responsibility for telling Mr. Baggan and Ms. Podraza that their January 1985 grievances were untimely.

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[3] On the same day, Mr. Baggan also resubmitted his pay request of December 21, 1984, to management.

Pursuant to the Master Agreement between the Agency and the certified exclusive representative, as well as Respondent's Supplement to the Master Agreement, Article 36, the negotiated grievance procedure provides for a three-step grievance procedure winding up in arbitration. Time limitations exist between the various steps. Pursuant to Step 2 of the Local Supplemental Agreement the Union could elevate the grievance to Step 2 within five (5) workdays of grievant's being denied relief at Step 1. Pursuant to the Master Agreement if Step 1 resulted in no relief within five (5) days, the grievant may elevate the Step 1 grievance to Step 2.

By letter dated February 15, 1985, Mr. Baggan attempted to elevate his grievances to Step 2 of the grievance procedure.[4] Mr. Baggan dropped a copy off at the Union office on Mr. Campisi's desk. The Activity's copy was directed to Mr. Leonard Hearne, Chief of the Contracts Division, the second level supervisor.

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[4] Mr. Campisi was awaiting the first level supervisor's written response to the Step 1 grievance, but the grievance procedure does not require such a response.

About a week and a half to two weeks later Mr. Campisi called Mr. Baggan and told him that Mr. Hearne had called him and knew nothing about the Step 2 grievance. Mr. Campisi then told Mr. Baggan that he had violated the grievance procedures and under no circumstances was he to try or attempt to push the matter along by himself. Mr. Campisi also told Mr. Baggan that from that point on he was to do absolutely nothing, that the Union would handle it. Mr. Baggan questioned him about the contractual time frames, but Mr. Campisi said not to worry about it, he was taking care of it.

From late February until mid-May 1985, Mr. Baggan heard nothing from either Local 2567 or management concerning the hazardous duty pay. In fact, Mr. Campisi thereafter did not pursue any grievance at all, neither for Mr. Baggan nor for Ms. Podraza. He did not advise Mr. Baggan of his failure to pursue the grievance to Step 2 of the negotiated grievance procedure. According to Mr. Campisi, he did not pursue the grievance because it appeared "fruitless." In his opinion Local 2567 was pursuing other avenues, such as meetings with upper-level regional management at which safety and health and hazardous duty pay at the precious metal recovery operations were being discussed. At one such meeting, held at Springfield, New Jersey on February 21, 1985, attended by AFGE DLA Council Vice President Joseph Tassone, Union President Nathan Goods, Mr. Nazare and Mr. Campisi, Mr. Tassone stated that the Local 2567's concern was not pay but health. No one present at this meeting objected to or elaborated upon this comment.

On at least two occasions during the period February 24, 1985 until mid-May 1985, Mr. Baggan visited either Mr. Nazare or Mr. Campisi at Local 2567's office. On each of his visits, although nothing had specifically been done on the grievances, Mr. Baggan was assured that the matters were being taken care of. On at least one of these occasions, Mr. Nazare told Mr. Baggan that Local 2567 was in the process of taking management to court and that Mr. Baggan would be called upon to testify as a witness when they finally did bring the matter to court.

Subsequent to about mid-May 1985, Mr. Baggan pursued his Crown Bullion hazardous duty pay directly with Colonel Otto Guenther, the DCASR Commander at the time. The Colonel caused an independent investigation to be conducted regarding safety, health and hazardous duty pay. As a result of this independent action, he and Ms. Podraza were paid for nearly all of their hazardous duty at Crown Bullion.[5] Nothing was ever heard from Local

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[5] According to Mr. Baggan, he is entitled to additional money for work at Crown Bullion. The record does not indicate the exact amount. Ms. Podraza does not appear to be making a claim for any additional money for her work at Crown Bullion.

2567 regarding either Ms. Podraza's or Mr. Baggan's Crown Bullion grievances. Local 2567 had nothing to do with the payment of the hazardous duty pay. As of the date of the hearing Mr. Baggan has heard nothing with regard to either his U.S. Metals Corp. hazardous duty pay request or grievances, filed on February 7, 1985 and February 8, 1985 respectively.

On or about August 1, 1985 Mr. Baggan was asked by Mr. Nazare and Mr. Campisi to come to Local 2567's office where Authority Agent Jon Steen was present. Mr. Baggan was asked at that time if he would be willing to give testimony in an unfair labor practice case which Local 2567 had filed against management. Mr. Baggan's initial response was that Local 2567 had failed to assist him and that he had no intention of helping them. Later on during this meeting Agent Steen reasoned with Mr. Baggan and Mr. Baggan reluctantly agreed to provide testimony. Still later, on August 9, 1985 Mr. Baggan had another change of heart and advised Local 2567 either in person or by telephone that he would not provide testimony in the ULP matter because it did not relate at all to his grievance and he felt no obligation to Local 2567. He also conveyed this feeling to Agent Steen.

On or about August 14 or 15, 1985, Mr. Nazare and Mr. Campisi called Mr. Baggan to the Local 2567's office, where they held another discussion concerning Mr. Baggan's decision not to give testimony to the FLRA agent. Mr. Baggan repeated his reasons for not giving testimony. Mr. Nazare became verbally abusive and told Mr. Baggan, "You are not a man and you have no fucking balls!" When he repeated this statement to Mr. Baggan, Mr. Baggan asked Mr. Nazare to knock it off and not to talk like that. Mr. Nazare said he would say it again and Mr. Baggan warned him that if he kept it up they were going to have a problem. Mr. Nazare then jumped up from the table and said, "Come on!" Mr. Baggan got up and the two engaged in a pushing match. Mr. Baggan does not recall who pushed first but a scuffle broke out. Mr. Nazare threw a stapler at him and it cut Mr. Baggan's arm as he tried to fend it off. Mr. Nazare followed this by picking up a chair and coming after Mr. Baggan. At this point Mr. Campisi came between Mr. Nazare and Mr. Baggan and asked Mr. Baggan to leave which he did. Later on Mr. Baggan returned to Local 2567's office and made peace with Mr. Nazare and ultimately agreed to cooperate with Agent Steen. He gave an affidavit the following day to the FLRA agent.

Discussion and Conclusions

The General Counsel takes the position that the charges underlying the Complaint are not barred by Section 7118(4)(A) of the Statute since the Respondent's inaction on the grievances was unknown to the Charging Parties and that, in any event, the alleged violations were of a continuing nature. The General Counsel further contends that Respondent violated Sections 7116(b)(1) and 7116(b)(8) when it consciously ignored the responsibility imposed by Section 7114(a) to fairly represent all unit employees and handled the Charging Parties' grievances in an arbitrary and perfunctory manner.[6] Finally, the Generally Counsel contends that Respondent violated 7116(b)(1) by threatening Mr. Baggan with bodily harm in an attempt to persuade him to assist the Union in its pending unfair labor practice.

In urging the undersigned to find the above cited alleged violations of the Statute, the General Counsel acknowledges that "Authority has not issued a decision on the issue of a breach of the union's duty of fair representation based upon (1) other improper motives/other than union affiliation, (2) arbitrariness, (3) negligence, or (4) the Union's obligations once a decision is made that a grievance is meritorious."

The Respondent, on the other hand, citing the date of the grievance, i.e. January 4, 1985 and the date of the charges August 23, 1985, takes the position that the charges were untimely. With respect to the merits of the complaint, the Respondent takes the position that inasmuch as they were handling the subject matter of the grievances in general discussions with management on a unit level it did not fail to fulfill the responsibilities imposed by the Statute of representing all unit employees fairly.

Pursuant to Section 7118(a)(4)(A) a charge is timely only if it is based upon conduct or events occurring within the preceding six month period. The only exception to the so-called six month statute of limitation appears in Section 7118(a)(4)(B) which reads as follows:

> (B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6 month period referred to in subparagraph (A) of this paragraph by reason of--
>
> > (i) any failure or the agency or labor organization against which the charge is made to perform a duty owed to the person, or

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[6] In support of his position the General Counsel relies in the main on American Federation of Government Employees, AFL-CIO, Local 987, 3 FLRA 714; Harris v. Schwerman Trucking Co., 109 LRRM 3135 (11th Cir. 1982).

> (ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6 month period,
>
> the General Counsel may issue a complaint based on the charge if the charge was filed during the 6 month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

In view of the foregoing, since the charges were filed on August 23, 1985, the six month cut off point would be February 23, 1985. Although the record indicates, as will be discussed below, that Respondent had no intention of processing the grievances from their inception, the Charging Parties were assured by Respondent's representatives in response to the Charging Parties' inquiries that their respective grievances were being processed. In fact in the latter part of February or early March Mr. Campisi admonished Mr. Baggan that if he continued to push his grievance on his own he would be violating the grievance procedure and assured him that the Respondent Union would handle the matter. The record further supports the conclusion that until just prior to the filing of charges on August 23, 1985, neither Mr. Baggan nor Ms. Podraza had any inkling that the Respondent Union had determined not to continue processing their respective grievances.

Accordingly, based upon the above, I find that the charges underlying the instant consolidated complaint are not barred by Section 7118(a)(4)(A) of the Statute.

Having determined that the charges were timely, it must now be determined, as alleged by the General Counsel, whether under all the circumstances disclosed herein the Respondent Union failed to fulfill the responsibilities imposed upon it by Section 7114(a)(1) of the Statute, namely to fairly represent all unit employees.

The record discloses, and I so find, that Mr. Nazare, the Union representative, accepted Mr. Baggan and Ms. Podraza's respective grievances on January 4, 1985, assured them that they would be processed and then proceeded to do nothing. In fact until October 1985, when an Authority agent conducted an investigation of the charges underlying the instant complaint, Mr. Nazare had no recollection of the grievances ever being filed. Not having any recollection, he admitted that he could not have told either Mr. Baggan or Ms. Podraza that they were not processed due to lack of merit. Although he further testified that such conclusion could have possibly been conveyed to him by Mr. Campisi, Mr. Campisi denied any knowledge of the January 4, 1985 grievances.

According to Mr. Campisi his only involvement with Mr. Baggan's grievances was in connection with the hazardous duty pay grievance of Mr. Baggan concerning work at U.S. Metals Corp. which was filed with the Union on February 8, 1985.

In connection with the U.S. Metals Corp. grievance filed by Mr. Baggan, the record indicates that this grievance was processed by Mr. Campisi only after Mr. Baggan had a heated discussion with Mr. Nazare concerning Union action on his and Ms. Podraza's pending grievances. This grievance was dropped shortly thereafter by the Respondent Union after Mr. Burke, Chief of Property, disclaimed authority to grant the hazardous duty pay. Mr. Burke did, however, acknowledge the merits of the grievance.

According to Mr. Campisi, who does not deny the foregoing events, he did not process the grievance further because it appeared "fruitless" to him. Although Mr. Campisi offered no explanation for his conclusion that further processing of the grievance would be "fruitless" he did allude to the fact that the Respondent Union was discussing health and safety with management on a unit level. However, in connection with such meetings with management, the record establishes that while the Union might have been concerned with health and safety conditions of the unit employees, there was no discussion of any hazardous pay that might be due to such employees, including Mr. Baggan and Ms. Podraza.

Upon the basis of the foregoing analysis of the record evidence concerning the Respondent Union's actions with respect to processing the respective grievances of Mr. Baggan and Ms. Podraza, I conclude that Respondent Union arbitrarily ignored such grievances and processed them at best in a perfunctory manner in contravention of the principles set forth by the Supreme Court in Vaca v. Sipes, 386 U.S. 171, wherein the Court defined the duty of fair representation in the area of processing grievances.[7]

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[7] Cf. Motor Coach Employees v. Lockridge, 403 U.S. 274, 301, wherein the Supreme Court reaffirmed its earlier holding in Vaca and noted: "the duty of fair representation was judicially evolved . . . to enforce fully the important principle that no individual union member, many suffer invidious hostile treatment at the hands of the majority of his co-workers" and that "the very distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment on the other hand needs strictly to be maintained."

This is not a case of negligence or erroneous decision, but rather a complete rejection by a union of its fair representation responsibilities imposed by the Courts and the Statute. To belatedly try to justify the abandonment of the February grievance on the ground of being "fruitless" defies logic, particularly in the face of an admission by the first-line supervisor that in his opinion the grievance had merit.

Further, with respect to the January grievances of Mr. Baggan and Ms. Podraza, the Union has offered no justifiable excuse for its failure to process same. Additionally, Mr. Baggan's testimony that he had been repeatedly assured that the grievances were being taken care of stands unrefuted.

In reaching the above conclusion I am aware that there is a split among the various Circuit Courts with respect to what constitutes "arbitrary" and/or "perfunctory" conduct. However, under any definition, I believe, given the facts of this case, the majority of the Courts would find the Union's action herein to be both arbitrary and perfunctory, and hence a violation of the Statute.[8/]

Turning now to the remaining issue of the complaint concerning the actions of Mr. Nazare in verbally and physically abusing Mr. Baggan because he declined to give testimony in support of a pending unfair labor practice charge filed by the Union against management, I find that such action on the part of Mr. Nazare, a Union representative, to be violative of Section 7116(b)(1) of the Statute.

Section 7102 of the Statute provides that each employee shall have the right to form, join or assist a labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal. Interference with an employee's Section 7102 rights constitutes a violation of Section 7116(b)(1). National Army and Air Force Technician Assoc., Local 371, 7 FLRA 154.

Here we have a Union representative throwing a stapler at Mr. Baggan, threatening him with a chair and verbally abusing him in an attempt to persuade him to testify in support of a pending unfair labor practice charge file by the Respondent Union. If an employee is forced to subject himself to such abuse for refusing

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[8/] Cf. National Federation of Federal Employees, Local 1453, OALJ-83-52, Case No. 4-CA-20022, March 23, 1984, pending before the Authority, wherein Judge Dowd presented a detailed analysis of the cases involving the duty of fair representation.

to support a union, it can hardly be said that any decision made by him with respect to supporting a union cause, was made freely and without fear of penalty or reprisal. Put another way, he either supports the union or prepares to defend himself from physical and verbal abuse. Any decision made under such circumstances can hardly be characterized as being freely made.

Accordingly, I find that by physically and verbally abusing Mr. Baggan because he decided not to give testimony in support of the Union's pending unfair labor practice charge, the Respondent Union violated Section 7116(b)(1) of the Statute.

Having determined that the Local 2567 has violated Sections 7116(b)(1) and (8) of the Statute, it is hereby recommended that the Federal Labor Relations Authority issue the following Order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the American Federation of Government Employees, AFL-CIO, Local 2567 shall:

1. Cease and desist from:

(a) Refusing and/or failing to fairly represent Lorraine M. Podraza and Robert M. Baggan, or any other unit employees, in connection with the processing of a duly filed grievance.

(b) Physically or verbally abusing Robert M. Baggan, or any other unit employees in an attempt to persuade them to give testimony in support of an unfair labor practice filed by American Federation of Government Employees, AFL-CIO, Local 2567.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Make whole Robert M. Baggan and Lorraine M. Podraza for any loss of hazardous duty pay they may have been deprived of by virtue of American Federation of Government Employees, AFL-CIO, Local 2567 failure to fairly represent them in connection with the processing of their duly filed grievances.

(b) Post at all its locations within the Defense Logistics Agency, Defense Contract Administration Services, New York Region, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the president of Local 2567, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places were notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region II, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Burton S. Sternburg
BURTON S. STERNBURG
Administrative Law Judge

Dated: April 11, 1986
Washington, D.C.

(2-CO-50025; 2-CO-50026)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse and/or fail to fairly represent Lorraine M. Podraza and Robert M. Baggan, or any other unit employees, in connection with a duly filed grievance.

WE WILL NOT physically or verbally abuse Robert M. Baggan, or any other unit employees, in an attempt to persuade them to give testimony in support of an unfair labor practice charge filed by American Federation of Government Employees, AFL-CIO, Local 2567.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL make Lorraine M. Podraza and Robert M. Baggan whole for any loss of hazardous duty pay they may have be deprived of by virtue of American Federation of Government Employees, AFL-CIO, Local 2567, failure to fairly represent them in connection with the
processing of their duly filed grievances.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278, and whose telephone number is: (212) 264-4934.

9-3/Case No. 60

Federal Labor Relations Authority

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NUMBER 60

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

June 23, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 34-CA-50734 (June 6, 1986)

Naval Sea Systems Command, Detachment (PERA-ASC) and International Federation of Professional and Technical Engineers, Local 1, AFL-CIO

Case No. 2-CA-50181 (June 9, 1986)

U.S. Immigration and Naturalization Service and American Federation of Government Employees, Local 1917, AFL-CIO

Case Nos. 8-CA-50230 and 8-CA-50269 (June 10, 1986)

Veterans Administration Center, Prescott, Arizona and American Federation of Government Employees, Local 2401, AFL-CIO

Y 3. F 31/21-3:

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL SEA SYSTEMS COMMAND
DETACHMENT (PERA-ASC)

Respondent

and

Case No. 34-CA-50734

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 1, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on April 17, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., June 6, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

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[34-CA-50734]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NAVAL SEA SYSTEMS COMMAND DETACHMENT (PERA-ASC) Respondent and INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 1, AFL-CIO Charging Party	Case No.: 34-CA-50734

Robert J. Gilson, Esquire
For the Respondent

Ralph J. McElfresh, Jr.
For the Charging Party

Ira Sandron, Esquire
For the General Counsel

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arises under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5, U.S. Code (5 U.S.C. § 7101 et seq.). At issue is whether Respondent violated Section 7116(a)(1) and (8) by failing to comply with Section 7115 when it refused to honor written assignments from employees which authorized it to deduct dues and remit them to the Charging Union. Respondent defends principally on the ground that such assignments were executed at a time when no appropriate unit existed, i.e. between the time when the Union was certified as the exclusive representative of such employees, and the time when the Authority clarified the unit in which such employees had worked by excluding them. In essence Respondent seems to argue that the Authority put the cart before the horse when it certified a new unit carved out of a Shipyard unit before it had completed the process of separating them from the existing unit by issuing a Clarification of Unit formally recognizing such separation.

A hearing was held in Norfolk, Virginia on November 14, 1985, at which all parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and make oral argument. Upon consideration of the entire record, and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact

Local 1 has for many years been the exclusive bargaining representative of a unit of about 1500 professional and technical employees at the Norfolk Naval Shipyard, embracing components in Norfolk, Newport News and Portsmouth, Virginia. In October of 1983, Respondent underwent a reorganization which removed from the Shipyard's administrative jurisdiction about 100 employees of the Naval Sea Systems Command Detachment, Planning and Engineering for Repairs and Alternations/ Amphibious Ships and Crafts (herein PERA), who are located in Portsmouth. Pursuant to Respondent's petition for clarification of the unit, unopposed by Local 1, the Regional Director of Region IV, FLRA, issued a Decision and Order in Case No. 4-CU-40003 on March 29, 1984. Having concluded that the PERA employees no longer shared a clear and identifiable community of interest with the other employees in the bargaining unit, she advised the parties that she would issue a Clarification of Unit excluding the PERA group from the established unit "absent the timely filing of an application for review of this Decision and Order with the Authority, or if one is filed and denied, or if the Authority does not undertake to grant review of this action within sixty (60) days after the filing of an application for review. . . ."1/

1/ Rule 2422.17 provides that a party desiring Authority review of the Regional Director's Decision and Order shall file an application "within sixty (60) days of the date of such action." As the usual five days for mailing are not added in this kind of case (§2429.22), such an application would have been due on May 29, 1984.

In the meantime, Local 1 had filed Case No. 4-RO-40010, in which it sought certification as the exclusive bargaining agent of the PERA group. It won an election and was certified on May 30, 1984, the day after any request for review was due in Case No. 4-CU-40003.

On July 13 the paperwork associated with the representation matter was completed, when the Regional Director issued a Clarification of Unit. That instrument described the Decision and Order of March 29 as "indicating an intention to issue a Clarification of Unit, absent the filing of a timely request for review, ordering that all employees employed by . . . (PERA) . . . be excluded from the bargaining unit. Noting that no such review had been requested, the Regional Director ordered the exclusion of the PERA employees from the larger unit.

Ten PERA employees executed Requests For Payroll Deductions For Labor Organization Dues (Standard Form No. 1187) at various times between the Certification of Local 1 on May 30 and issuance of the Clarification of Unit on July 13. (G.C. Exhibit 6). Two employees executed such forms after July 13. (G.C. Exhibits 8(a) and (b)). Those forms showed the biweekly dues structure in effect at the time the employees signed, and provided that the signatory employees' authorization of dues deductions would become effective the first full pay period of the calendar month following its receipt in the payroll office. The form also provided that Respondent would deduct the amount certified thereon _by the labor organization_ as its regular dues, and authorized any change in that amount which the Union certified to be the result of a uniform change in its dues structure.

Local No. 1 then postponed submission of these forms to Respondent pending the completion of contract negotiations covering the Shipyard. That was not accomplished until early in 1985. In the meantime the International Union determined to raise its _per capita_ tax by 25¢ per month commencing on March 1, 1985 and another 20¢ per month one year later, and Local 1 made a corresponding change in its dues structure.

On January 17, 1985, Local No. 1 President Ralph J. McElfresh, Jr. wrote Captain J. F. Meyer requesting negotiation of an agreement to cover PERA employees and to provide for dues check-off. The Union sought a contract identical in its terms to the recently negotiated Shipyard agreement. On February 19, in anticipation of a meeting that did not occur, McElfresh signed Section A of the 12

Forms 1187, a section reserved for use by the labor organization, and changed the dues already shown to conform to the newly-adopted amounts. By letter of February 25, he forwarded the forms to Captain Meyer with a request that they be immediately processed so that withholding would commence with the pay period beginning on March 3.

On February 28 Andrew James, Head of the Shipyards' Employees Relations Division, wrote McElfresh. He agreed to two checkoff authorizations which had been signed by the employees on July 26 and August 17, 1984. He returned the remaining ten forms on the ground that they were executed by the employees "prior to the July 13, 1984 date of certification of IFPTE Local #1 as the exclusive representative of the employees," and, therefore, could not be processed under the provisions of 5 USC 7115(a).[2] James requested that employees wishing to allot dues submit completed forms to the Payroll Clerk. This was never done. Instead an unfair labor practice charge was filed on August 8, 1985.

Discussion and Conclusion

Section 7115(a) provides in relevant part:

> § 7115. Allotments to representatives
>
> "(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

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[2] I find, as James testified, and as seems self-evident, that he meant to refer to the July 13 Unit Clarification, rather than the Certification which had issued on May 31.

> "(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when-
>
> "(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or
>
> "(2) the employee is suspended or expelled from membership in the exclusive representative."

Respondent contends that the statutory requirement that dues authorizations "be received from . . . employee(s) in an appropriate unit" was not met here because such authorizations were executed before the FLRA had finally resolved the unit question with issuance of the Unit Clarification. As it puts it, "a unit is not appropriately constituted until all representational questions are decided," and hence written assignments executed prior to that resolution "are not from employees in an appropriate unit." It further argues that it would be liable to any employee who repudiated his authorization as invalid.

General Counsel dismisses such defense as frivolous, pointing to the earlier certification, the fact that no exceptions had been filed to the even earlier Decision and Order (with the "result . . . (that) . . . the clarification of the unit that issued on July 13th reflected what had been found in the March 29 Decision and Order"), and the further fact that any claimed confusion about the unit placement of the employees had been finally resolved long before the assignments were presented to Respondent.

There is a superficial plausibility to Respondent's defense. Arguably, the employees' written assignments were executed while they were in a representational limbo: Local No. 1 had been certified to represent them as members of the PERA unit, yet it remained their representative as a part of the Shipyard unit until the Unit Clarification issued excluding them from that larger unit. In a sense, the baby was christened before it was delivered. But this seems to be a thin, tenuous and technical argument.

The Decision and Order of March 29 declared that, absent timely and successful exceptions, the Regional Director would issue a Clarification of Unit excluding the PERA group from the established unit. Thus it was a foregone conclusion, when no exceptions were filed by May 29, that the PERA group would be separated from the larger unit. It was also known that the employees to be excluded constituted an appropriate unit and had voted for Local No. 1 to represent them. This was confirmed a few days later when Local No. 1 was certified. While one might argue that the old unit's clarification should logically have preceded official recognition of a bargaining agent for a new unit, one can also argue that the Clarification of Unit was a mere ministerial formality compelled in the circumstances by the terms of the Decision and Order. Its timing ought not affect the underlying reality, which was, at the time these checkoff authorizations were executed, that FLRA would exclude the PERA group from the larger unit, and that it had certified the Union as representative of the new group.

In addition to these considerations, it is to be noted that Section 7115(a) does not appear to require that a checkoff authorization be signed by an employee at a time when he or she is in an appropriate unit. It speaks, instead, of an agency which has received a written assignment from an employee in an appropriate unit. Here the unit question had been resolved long before the assignments were received, and the assignments received were from people in an appropriate unit.

Finally, in an apparent afterthought which it did not bother to brief, Respondent argued at hearing that the assignments were invalid because the amounts to be withheld had been altered by Local No. 1 President McElfresh. This did not concern Respondent with respect to the two assignments it honored, and there was no offer to process the others based on the original amounts. Thus with the two it assumed the risk it professes to fear: that it would be left holding the bag should those employees repudiate their assignments.

The assignment form, in Section A, provides for a Union officer to certify the amount of the regular dues for the member who has authorized withholding. Section B, in which the employee authorizes the deduction, "further authorizes any change in the amount to be deducted which is certified by the above-named labor organization as a uniform change in its dues structure." Respondent acknowledges that an agency must ordinarily honor such a change, but asserts it should not do so where the change was made prior to the submission of the assignments to it and without the employees being aware that such "alteration" had occurred. It cites no authority for either proposition, and I am unaware of any.

General Counsel relies on three cases[3] for the proposition that an agency must honor dues increases requested by a union. None, however, speaks to alleged irregularities in the procedure by which dues may have been raised. I am satisfied that an agency may not properly defend its conduct by questioning such procedures, which have to do with a union's internal affairs. I accordingly find that Respondent has failed to comply with Section 7115's mandate that it honor written authorizations for the deduction of regular and periodic dues, in violation of Section 7116(a)(1) and (8).

I recommend that the Authority enter the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Naval Sea Systems Command Detachment (PERA-ASC), shall:

1. Cease and desist from:

(a) Refusing to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by refusing to accept and honor valid written dues assignments from employees for the payment of regular and periodic dues to International Federation of Professional and Technical Engineers, Local 1, AFL-CIO, or any other exclusive representative.

(b) Interfering with, restraining, or coercing unit employees by refusing to accept and honor valid written dues assignments from employees for the payment of regular and periodic dues to International Federation of Professional and Technical Engineers, Local 1, AFL-CIO, or any other exclusive representative.

---

[3] Department of Navy, Naval Underwater Systems Center, Newport, R.I., 16 FLRA 1124; Department of Justice, U.S. Attorney's Office, Los Angeles, California, 17 FLRA 1005; HHS, Social Security Administration, 13 FLRA 625.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Reimburse the exclusive representative, International Federation of Professional and Technical Engineers, Local 1, AFL-CIO, in an amount equal to the regular and periodic dues it would have received from the pay of certain employees but did not receive as a result of the unlawful refusal to honor the employees' valid written dues assignments for such purpose.

(b) Commencing with the first pay period after the date of this Order, deduct regular and periodic dues from the pay of any unit employee who has made or makes voluntary assignments for such purpose, and make an appropriate allotment of such dues to the exclusive representative, International Federation of Professional and Technical Engineers, Local 1, AFL-CIO.

(c) Post at the Naval Sea Systems Command Detachment (PERA-ASC), copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a responsible official of Respondent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

John H. Fenton
JOHN H. FENTON
Chief Administrative Law Judge

Dated: April 17, 1986
Washington, D.C.

[34-CA-50734]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by refusing to accept and honor valid written dues assignments from employees or by similarly treating valid written dues assignments for the payment of regular and periodic dues by any other unit employees to International Federation of Professional and Technical Engineers, Local 1, AFL-CIO, or any other exclusive representative.

WE WILL NOT interfere with, restrain, or coerce our employees by refusing to accept and honor valid written dues assignments from employees for the payment of regular and periodic dues to International Federation of Professional and Technical Engineers, Local 1, AFL-CIO, or any other exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reimburse the exclusive representative, International Federation of Professional and Technical Engineers, Local 1, AFL-CIO, in an amount equal to the regular and periodic dues it would have received from the pay of certain employees but did not receive as a result of our unlawful refusal to honor their valid written dues assignments for such purpose.

WE WILL deduct regular and periodic dues from the pay of any unit employee who makes a voluntary assignment for such purpose, and make an appropriate allotment of such dues to the exclusive representative, International Federation of Professional and Technical Engineers, Local 1, AFL-CIO.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, NW., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8452.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. IMMIGRATION AND
NATURALIZATION SERVICE

Respondent

and

Case No. 2-CA-50181

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1917, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on May 1, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., June 9, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

[2-CA-50181]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. IMMIGRATION AND
NATURALIZATION SERVICE

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1917, AFL-CIO

Charging Party

Case No.: 2-CA-50181

Cecile O'Connor and
E. A. Jones, Esquires
For the General Counsel

Mrs. Carol D. Chasse
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 *et seq.* (herein called the Statute). It was instituted by the Regional Director of Region 2 based upon an unfair labor practice charge filed on March 4, 1985 and amended on April 29, 1985 by the American Federation of Government Employees, Local 1917, AFL-CIO, (herein called the Union), against the United States Immigration and Naturalization Service (herein called the Respondent). The Complaint alleged, in essence, that Respondent violated section 7116(a)(1) and (5) of the Statute by issuing a memorandum changing bargaining unit working conditions by reorganizing its New York District inspectional personnel and placing them in a duty assignment pool, without first providing the Union adequate prior notice and an opportunity to bargain over the impact and implementation of the change.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in New York, New York at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the Respondent and the General Counsel and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

At all times material herein, the Union is and has been the exclusive representative for a nationwide unit of all personnel of Respondent's service, with certain exceptions which are immaterial to this matter.

Sometime around October 1, 1984, Respondent consolidated or reorganized the Seaport and Airport Divisions of its New York District. Prior to the consolidation, the New York District contained separate physical locations and inspectional staff for its Seaport and Airport Divisions. The Seaport Division (hereinafter called Seaport) consisted of 7 maritime inspectors, a supervisory staff located at 26 Federal Plaza, New York, New York, and the Quarantine Station personnel located on Staten Island, New York. The Airport Division, located at John F. Kennedy International Airport, Queens, New York (hereinafter called the Airport), included several duty sites at that facility: East wing, West wing, Pan American, TWA, British Airways and American Airlines terminals. The Airport staff, prior to October 1, 1984, consisted of approximately 120 inspectors whose duty involved conducting primary and secondary immigration inspections of passengers at the Airport. The Airport and Seaport Divisions prior to October 1 appear to have been separate entities with no regular interchange of duties between inspectors in the two Divisions. Further, the record reveals that different duties were performed by inspectors in each Division as each maintained unique identities and work assignments for the inspectors. The Divisions also had separate directors, thus, Thomas M. Roland occupied the position of Area Port Director while Charles Sava was the New York District Director again indicating separateness of the Divisions.

The record also discloses that overtime earnings in the two Divisions differed. Since the Seaport and Airport Divisions maintained separate overtime money wheels during fiscal year 1984 each Seaport inspector earned close to the $20,000 Congressional cap on overtime earnings. The average overtime earnings per full-time inspector at the Airport Division was approximately $12,000 during 1984. Moreover, the Airport Division operated under a "gap" system, whereby pursuant to direction from the Washington Central Office, the difference in overtime earnings between high and low inspectors could not amount to more than $2,000. It therefore appears that Seaport inspectors lost approximately $8,000 in overtime earnings per year due to the consolidation or reorganization.

With regard to duties, Airport inspections are sedentary, allowing the individual inspector to sit at a booth while processing paperwork and questioning deplaning passengers concerning their destinations. If admissibility questions emerge, the passengers are then referred to the secondary inspection line for a more thorough interview or inspection of documents or Customs declarations and passports. Where problems such as the substitution of photos on documents by imposters arise however, supervisors are available at the Airport to assist the inspectors. There is also no suggestion on the record that Airport inspectors are subject to any of the numerous hazards of sea inspections as are shown below.

Seaport inspections, on the other hand, involve boarding cargo vessels, tankers, cruise ships and other sea-going vessels and are performed by journeyman inspectors who operate without immediate supervision at the inspection site. The Seaport inspector drives to the vessel inspection point which could be any waterway within the jurisdiction of the Port of New York, from Montauk Point through Staten Island and north up the Hudson River to Kingston. The vessel he inspects might arrive at any hour of the day or night. In order to perform the inspection he may board either from a pier/dock location or from a launch. In some cases the vessel is anchored, in others it is still underway. In the case of moving vessels, the inspector may be required to board by climbing a Jacob's ladder, which is either a rope and wood or metal and plastic ladder, with rails, on both sides, which hangs at an angle from the side of the ship.

Some agility is undoubtably required in order to board a moving vessel, to avoid being crushed or falling off the ladder. Also other hazards of instream boardings exist such as a launch capsizing enroute to/from ship (bad weather); falling into the water when moving from the launch to Jacob's ladder; falling from the ladder to the launch deck; being crushed by a launch while on Jacob's ladder, and falling due to imbalance created by the weight of the boarding bag. Many hazards are also present on board the inspected vessels including: slips and falls on wet or icy decks and ladders; cargo shifts or rolls which can crush an inspector; and, falls into open deck ports and hatches. In addition to shipboarding and hazards once aboard ship, at dockside, an inspector can be subject to injuries from falling debris/cargo, falls on gangways, falls off narrow gangplanks, injuries from breaking docklines, injuries from overhead cargo nets, booms, cables, etc., falls through holes in the dock and the danger of criminal attack in the dock areas at night.

In support of added physical requirements a former Airport inspector, Joe Catalan testified that he did not have the physical ability to cope with the sea inspection demands. Catalan apparently reinjured his knee while climbing a Jacob's ladder and was required to seek medical treatment. Subsequently, Catalan applied for a medical disability and Respondent removed him from the Airport, the money wheel, and the opportunity for overtime. Although it is contended, Catalan was an outstanding Airport inspector for many years, he was transferred to perform entirely different functions because he was not physically able to board ships. In short, Airport inspectors were required to leave sedentary type work for a more physical, dangerous position when required to perform seagoing inspections.

Other areas of concern about impact were expressed by the Union during the hearing. First, it appears that some qualified Seaport inspectors wore firearms when inspecting seagoing vessels, but Airport inspectors did not wear firearms in their job. In addition the reassignment to the Airport in Queens from Manhattan required substantially longer commuting distances for some Seaport inspectors who were forced to commute to the Airport, on a regular basis. Since mass transportation is apparently not convenient, some inspectors increasingly relied on private vehicles thereby incurring a $5.00 parking fee charge at the Airport, a cost that they did not have prior to the reorganization. On the other side of the coin, former Airport inspectors were now required to travel to variable duty sites ranging over at least 140 miles of waterway, at any hour of the day or night when previously they reported directly to the Airport on a set schedule. Among other things, Seaport inspectors appear to have lost a prize assignment due to the reorganization. Formerly, the assignment to Carribean and European cruise ships occurred only in the Seaport Division according to a seniority system. Following the reorganization, this system disappeared and Airport inspectors as well as supervisors were assigned to this duty.

On August 24, 1984 the Union, through a Vice President Rita Mason, received notice from the Respondent that it proposed to reorganize the Seaport and Airport effective September 30, 1984. Mason was the designated representative to receive notice of changes at that time because the officers of Local 1917 had resigned around that time due to the terminations of both the former President and Vice-President. On September 5, 1984, Gregory Fiorentino was installed as President of the Union. On September 7, 1984, Fiorentino formally notified District Director Sava that he was the new president and that Mason would no longer administer the Local's business. Thereafter, by letter dated September 10, 1984, Fiorentino requested Respondent negotiate the impact of the proposed consolidation. Although the District had supplied only a sketchy idea of the reorganization, Fiorentino outlined a few of his concerns regarding impact such as volunteers, firearms, and difficult commutes. At the same time, Fiorentino specifically proposed that no involuntary reassignments be made and that volunteers be used exclusively. Fiorentino testified that he did not believe Sava would accede to his conditions and he wanted to get in a clear request to negotiate. He therefore requested scheduled negotiations for a date as soon as possible.

Sometime around September 17, 1984, Fiorentino met with bargaining unit members at each airport terminal in order to discuss the possible impact of the reorganization or consolidation. His purpose according to testimony was to formulate bargaining proposals relating to the employee input.

Respondent issued a September 25, 1984 response to Fiorentino's bargaining request which was received in the Union mailbox on September 27, 1984. Fiorentino received Respondent's reply on October 4, 1984, or three days after the change was implemented. According to Fiorentino he was not contacted in any other manner to schedule negotiations. Upon review of the Respondent's reply Fiorentino discovered that Respondent had failed and refused to set a date certain for negotiations. Furthermore, Respondent unceremoniously rejected the volunteer proposal and supplied a cryptic reference to the firearms section of the examination handbook. The Respondent never notified the Union that the implementation date was changed from September 30, to October 1, 1984.

On October 1, 1984, Seaport and Quarantine personnel from Manhattan were permanently reassigned to the Airport. One pool of inspectors was formed and the Seaport Division formerly at 26 Federal Plaza ceased to exist. With the accumulation of experience the inspectors began performing both seaship and airship inspections as assigned. However, the former Airport inspectors initially swapped out of the maritime assignments with such frequency that Respondent had to restrict shift swapping in January, 1985. At the time of the hearing, neither pre-implementation nor post-implementation bargaining had occurred regarding the October 1, 1984 reorganization.

In the past, the Union's response to Article 3, Section G (hereinafter called Article 3G) notices of proposed changes varied according to the subject matter and the individual union representative who demanded bargaining. Neither Respondent nor the Union always responded, as a matter of practice, in a manner consistent with the procedures set forth in Article 3G of the negotiated agreement.1/

1/ Article 3G reads, in pertinent part, as follows:

> G. The parties recognize that from time to time during the life of the agreement, the need will arise for management to change existing Service regulations covering personnel policies, practices, and/or working conditions not covered by this agreement. The Service shall present

(continued)

Director Sava testified that during his four years as director he would: 1) notify the Union regarding changes in working conditions, 2) receive a Union response regarding any concerns, 3) issue a written reply expressing agreement or disagreement and 4) if necessary, review the Union's request to negotiate pursuant to its contractual right. The testimony at hearing disclosed that Sava interpreted the contractual Article 3G provision to mean that the Union could not submit its concerns and request negotiations

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(footnote 1 continued)

> the changes it wishes to make to existing rules, regulations, and existing practices to the Union in writing. The Service recognizes that this obligation exists at the national, Regional, and District level when such changes are to be made. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) within a set time after receiving notice from management of the proposed change. The time will be:
>
> 22 Work Days at National Level
> 10 Work Days at Regional Level
> 10 Work Days at District Level
>
> If disagreement exists, either the Service or the Union may serve notice on the other of its interest to enter into formal negotiations on the subject matter. The Union will request negotiations within 5 work days of receipt of the Service response. Such negotiations must begin within 5 work days of receipt by the other party of a request to negotiate. Reasonable extensions of these time limits may be granted on request.
>
> Nothing in the foregoing shall require either party to negotiate on any matter is not obligated to negotiate under applicable law.

simultaneously.[2] Charles S. Murphy, president of the Union National Counsel, testified that the Union had never

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[2] In addition to Article 3G several other articles of the negotiated agreement appear pertinent, such as:

ARTICLE 23 - Reduction-in-Force, Transfer of Function and Reorganization, reads in pertinent part, as follows:

> A. The Service and the Union jointly recognize that occasions may arise where adjustments of the work force may be necessary either by reduction-in-force, transfer of function, or reorganization.
>
> B. (1) A reduction-in-force means the release of employees from their competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement; when lack of work or funds, reorganization, reclassification due to change in duties, or the need to place a person exercising re-employment or restoration rights requires the Service to release the employee.
>
> (2) Transfer of function means the transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas, or the movement of the competitive area in which the function is performed to another commuting area.
>
> (3) Reorganization means the planned elimination, addition, or redistribution of functions or duties in an organization.
>
> C. Prior to official notification of employees, the Union will receive 30 days advance notice of any pending reduction-in-force or transfer of

(continued)

been informed of such an interpretation, and on occasion, the parties omitted the Article 3G response requirements and proceeded to negotiate on proposed changes. Respondent's evidence in support of a consistent past practice consists of 2 District Level changes, first, a restriction on the use of government vehicles and second, a February 21, 1982 reorganization of the Special Investigations Branch. It should be noted that in both instances the Union submitted initial proposals and demanded to bargain simultaneously. In fact, negotiations never occurred regarding the government vehicles because Respondent rescinded the change. It should also be noted that although the Special Investigations Branch was slated to be reorganized on February 21, 1982, the Respondent did not reply to the Union's initial bargaining demand until February 24, 1982.

Conclusions

A. Respondent's Waiver Argument

Respondent argues that this matter involves only a differing and arguable interpretation of Article 3G which it claims establishes procedures to be used when changes in personnel policies or working conditions are made. Respondent's argument, in essence, is that the Union waived its right to negotiate on the reorganization herein when it did not request formal "negotiations within five (5) work days of receipt of the Service response." Respondent therefore asserts that while it has a contractual requirement to notify the Union with enough specificity to permit it to present its "views and concerns" within a set time that the Union also must strictly follow the procedure and any demand it makes to bargain outside that procedure is premature, ineffective and constitutes a waiver. However, record

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(footnote 2 continued)

> function. This notice, in writing, will include the reasons for the reduction-in-force or transfer of function, the approximate number and types of positions affected, the approximate date of the action, and an invitation to the Union to a meeting conducted by the Service to explain the reduction-in-force or transfer of function procedure, and answer relevant questions.

evidence does not support a finding that this practice is uniformly followed by the parties. Furthermore, Respondent ignores Article 23 of the negotiated agreement which establishes a procedure different from that urged by Respondent to deal with a reorganization which is defined therein as a "planned elimination, addition, or redistribution of functions or duties in an organization" and contains time frames for handling changes such as found in this case which could also be argued as the proper period of time to be applied.

In my opinion, the waiver defense lacks merit. In the first place, one instance of past local practice of negotiation under Article 3G, which application here is questionable, establishes neither acquiesce nor duration essential to prove this as a practice of negotiations between the parties. Secondly, to label this matter as one of contract interpretation would be to distort an exclusive representative's right to request bargaining. Since changes in conditions of employment were proposed by Respondent, a specific request to negotiate which Union president Fiorentino made on September 10, if Union proposals were not acceptable, would hardly seem to be premature. Respondent's main point seems to be that the exclusive representative through the language of Article 3G as interpreted by Respondent has waived the right to request bargaining until it has received from Respondent, its final position on proposals submitted by the Union. Respondent's position, if it is indeed arguing a waiver in this matter, is clearly contradictory since waivers under the Statute must be clear and unmistakable. Thus, if the contract language as urgued by Respondent is arguable it cannot be a clear and unmistakable so as to constitute a statutory waiver. See, Internal Revenue Service, 10 FLRA 182 (1982); Immigration and Naturalization Service, 10 FLRA 202 (1982); Department of Treasury, 10 FLRA 566 (1982); Department of the Air Force, 5 FLRA 9 (1981). Moreover, Respondent is in substance arguing that the Union should have issued yet another bargaining request, after implementation of the change. This is so since the September 27, 1984 reply by Respondent, did not schedule negotiations and foreclosed any opportunity to bargain prior to the reorganization. The Statute does not require an exclusive representative to make futile bargaining requests. See Department of the Air Force, supra.

Accordingly, it is concluded that the Union did not waive its right to make a bargaining request prior to completion of the Article 3G procedure and that a timely request to bargain existed. Moreover, it is concluded that the matter does not involve a question of differing and arguable interpretation of the parties.

B. Whether Impact Was More Than De Minimis

Turning to the General Counsel's contention that Respondent excerised a management right in reorganizing or consolidating all inspectional functions at the Airport and dismantling the Seaport Division and reassigning those inspectors to the Airport thereby creating an impact bargaining obligation under the Statute. The crux of what the General Counsel contends is that loss of overtime by the seven Seaport inspectors, new and different inspectional duties for all inspectors including the addition of physical hazards as contrasted to sedentary work, substantial changes in commuting distances, parking fees and rights to carry handguns constituted drastic changes in working conditions which were foreseeable and resulted in adverse impact on all bargaining unit employees which was more than *de minimis*. Although Respondent did not raise the question of whether these changes were more than *de minimis* the Authority has recently dealt with that issue on several occasions. The Authority has held that in determining whether the impact or reasonably foreseeable impact on bargaining unit employees is no more than *de minimis*, the totality of the facts and circumstances presented in each case must be examined. See *Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois*, 19 FLRA No. 101, 19 FLRA 827 (1985); *Department of the Treasury, U.S. Customs Service*, 19 FLRA No. 128, 19 FLRA 1155 (1985); *United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois*, 20 FLRA No. 6, 20 FLRA 46 (1985); *Bureau of Field Operations, Social Security Administration, San Francisco, California*, 20 FLRA No. 9, 20 FLRA 80 (1985); *Federal Aviation Administration, Washington, D.C.*, 20 FLRA No. 11, 20 FLRA 112 (1985); *Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina*, 20 FLRA No. 31, 20 FLRA 233 (1985); *U.S. Department of Housing and Urban Development, Washington, D.C. Area Office*, 20 FLRA No. 38, 20 FLRA 374 (1985); *Federal Aviation Administration*, 20 FLRA No. 45, 20 FLRA 430 (1985); *Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 20 FLRA No. 52, 20 FLRA 474 (1985); *Environmental Protection Agency and Environmental Protection Agency, Region II*, 20 FLRA No. 76, 20 FLRA 644 (1985).

To examine those circumstances the Authority established 5 factors to be used in determining whether a particular change was more than de minimis. Those factors are: the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like; the temporary, recurring or permanent nature of the change; the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past. The Authority also noted that a determination as to whether the exercise of a management right under section 7106(a) of the Statute gives rise to a duty to bargain under section 7106(b)(2) and (3) will not necessarily require in every case a determination as to whether the exercise of the management right results in a change in a condition of employment having an impact on bargaining unit employees which is more than de minimis, especially where there is no indication that the nature and degree of impact is at issue in the case. Here Respondent unquestionably exercised a management right when it reorganized its Airport and Seaport Divisions and reassigned all the inspectors to perform duties which differed from the duties performed by them in the past. Therefore, the nature and degree of impact must be considered under the criteria established by the Authority.

Applying the suggested factors to the instant case, it must be found that the evidence establishes that the instant changes are more than de minimis. Approximately 127 employees are involved in the reassignment. While a nationwide unit is involved, even Respondent concedes that here negotiations on working conditions should be conducted at the local level. This fact is buttressed by Article 3G of the negotiated agreement which provides for time frames for local as well as national negotiations. It is noted that the duties of all 127 employees especially Airport personnel changed considerably from sedentary to highly physical work. Moreover, the location, work atmosphere, hours, benefits and overtime wages were changed in a more than minimal way. Without question the change was permanent since the Seaport offices were dismantled and those inspectors sent to work at the Airport. It is hard to imagine a situation in which changes had more potential for effecting employees involved.

Accordingly, it is found that the instant change which reorganized approximately 127 employees was more than de minimis. Consequently, the remainder of the matter must be examined to ascertain whether the Respondent met its Statutory duty to negotiate.

C. Did Respondent violate section 7116(a)(1) and (5) of the Statute by reorganizing its Airport and Seaport Divisions without giving the Union adequate prior notice and an opportunity to negotiate.

1. Did the Union submit a timely demand to bargain on September 10, 1984.

It is well settled that when a union receives notice from an agency regarding a forthcoming change, it becomes the union's obligation to either request bargaining or request more time to consider the change. Department of the Treasury, U.S. Customs Service, Region I (Boston, Massachusetts), 16 FLRA 654 (1984).

The Union received notice of the impending change from District Director Sava on September 10, 1984.[3] After receiving the notice president Fiorentino requested explication of the change and identified two areas of impact. At that time he also urged Sava to consider the fact that housing arrangements were already linked to the very job sites which the District was proposing to change. Likewise, he raised the point that Respondent allowed inspectors to carry firearms, upon appropriate qualification, when performing inspections at sea. In a preemptive manner, Fiorentino proposed that if the Respondent agreed to use volunteers only, and provide firearms training, negotiations on the Seaport consolidation would not be necessary. In anticipation that Respondent would not submit to his demands, Fiorentino requested to a set date for negotiations. So far Fiorentino's action hardly appears to be a waiver of any right but could be reasonably construed as perfecting the right to bargain regarding the impact and implementation of the reorganization. This could hardly be construed as an eleventh hour bargaining request since at the time of the demand the pending consolidation was approximately three weeks away. In my view the Union acted with reasonable dispatch on September 10, 1984 when Fiorentino requested to bargain, submitted proposals and addressed areas of employee concern within the known scope of the change. Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois, 16 FLRA 141 (1984). The Respondent was irrevocably placed on notice that, absent acceptance of the Union's suggestions regarding volunteers, it was requesting negotiations. If so, Respondent was obliged to negotiate. I find that the Union indeed perfected its demand and reject, therefore, Respondent's argument that no Union request to bargain was before it.

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[3] Article 3G as already noted establishes procedures whereby the Union shall provide it's views to the Agency within 10 days of receipt of notice of a change. In this case, the initial notice of the change was received by the Union on August 24, 1985 and exactly 10 work days elapsed (excluding the Labor Day Holiday) prior to the Union's bargaining demand. The negotiated agreement does not provide an express prohibition on requests to bargain at this juncture. On September 10, 1984 the Union expressed its concerns, submitted preemptive proposals and requested to bargain. Seemingly, the Union's action complied with the agreement and more importantly the Statute. In my view, the Union's bargaining rights were perfected.

2. The Respondent's conduct prior to implementation and the actual implementation was tantamount to a refusal to bargain and violated Section 7116(a)(1) and (5) of the Statute.

Since it is found that Respondent was obligated to proceed to negotiations based on a bona fide Union's request it must be determined whether Respondent then met that obligation. Notwithstanding the fact that a timely request to negotiate was before it, Respondent ignored its statutory obligation to negotiate prior to implementation and effectively foreclosed bargaining by its conduct. The record discloses that Respondent delayed more than two weeks before responding to the Union's September 10, 1984 bargaining demand answering on September 25, 1984. Its response did not accede to the Union's preemptive demands. This response was placed in the Union's mailbox on September 27, 1984, one workday before the scheduled implementation date of October 1, 1984. Moreover, the response did not attempt to set negotiations or to delay implementation until negotiations could be scheduled. The record also reveals no other communication or response from Respondent prior to the reorganization or consolidation of October 1, 1984.[4] The above conduct leads to the conclusion that the Union was not afforded an opportunity to meet with management and discuss impact proposals in any meaningful fashion prior to implementation. See for example, Bureau of Government Financial Operations Headquarters, 11 FLRA 334 (1983). Respondent's failure to schedule such negotiations prior to implementation, therefore, prevented the Union the opportunity to engage in the face-to-face negotiations envisioned by the Statute.

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[4] Union President Fiorentino did not receive the response until October 4, 1984 because he was attending labor management consultations with Respondent's Labor Relations Staff in Burlington, Vermont. A fact which could hardly have escaped Respondent's attention.

Upon receipt of a timely bargaining request from an exclusive representative and upon discovery that negotiations can not be completed prior to the proposed implementation date, it is my opinion that a Respondent must either change that date or justify its refusal to do so. Since the Respondent initially established an implementation time frame, it would not be unreasonable to require it to assume the burden of insuring that negotiations were completed prior to implementation. The record in this case is devoid of any evidence suggesting that an overriding exigency existed which would require immediate implementation of the instant change by Respondent. In the absence of such evidence it is difficult to see why Respondent had to implement this reorganization by October 1, 1984. Respondent offers no answer to that question. As the General Counsel points out, October 1, 1984 is merely the start of a new fiscal year, and although having the reorganization in place by that time may have been desirable for Respondent, it also has a statutory oblitation to conduct impact and implementation negotiations prior to such a change or offer adequate reasons why it could not do so. Therefore, it is my conclusion that the unilateral reorganization or consolidation of October 1, 1984 of the Seaport and Airport Divisions prior to impact and implementation negotiations violated Section 7116(a)(1) and (5) of the Statute.

In agreement with the General Counsel, it is also found that both a bargaining order with retroactive application of any agreement reached and the posting of a notice are appropriate measures in this matter to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the Immigration and Naturalization Service, New York District, New York, New York shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in working conditions by reorganizing or consolidating its New York District with the result that all New York District inspectional personnel, other than those assigned to Hamilton, Bermuda, being placed in a duty assignment pool of inspectors located at Respondent's John F. Kennedy International Airport facility, without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, the exclusive representative of certain of its employees, and affording it the opportunity to bargain concerning such changes and/or impact and implementation of the change.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Notify the American Federation of Government Employees, Local 1917, AFL-CIO, in advance of any intended changes in the working conditions by reorganizing or consolidating its New York District with the result that all New York District inspectional personnel other than those assigned to Hamilton, Bermuda, being placed in a duty assignment pool of inspectors located at Respondent's John F. Kennedy International Airport facility, and upon request, negotiate with the exclusive representative concerning such proposed changes.

(b) Apply retroactive to October 1, 1984, any agreement reached pursuant to a bargaining request made by American

Federation of Government Employees, Local 1917, AFL-CIO, or its authorized representative concerning reassignments to pools of inspectors located at the John F. Kennedy International Airport facility.

(c) Post at its John F. Kennedy International Airport facility copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 2, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash, Jr.
ELI NASH, JR.
Administrative Law Judge

Dated: May 1, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally institute changes in working conditions by reorganizing or consolidating the New York District with the result that all New York District inspectional personnel other than those assigned to Hamilton, Bermuda, being placed in a duty assignment pool of inspectors located at the John F. Kennedy International Airport facility, without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, the exclusive representative of certain of our employees, and affording it the opportunity to bargain concerning such changes and/or the impact and implementation of the change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of their rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL notify the American Federation of Government Employees, Local 1917, AFL-CIO, in advance of any intended changes in the working conditions in the New York District resulting in assignment of inspectional personnel other than those in Hamilton, Bermuda, being assigned to a duty pool located at the John F. Kennedy International Airport facility, and upon request, negotiate concerning such proposed changes.

WE WILL apply retroactively to October 1, 1984, any agreement reached pursuant to a bargaining request made by the American Federation of Government Employees, Local 1917, AFL-CIO, concerning reassignment of inspectional personnel other than those located in Hamilton, Bermuda being placed in a duty assignment pool for inspectors located at the John F. Kennedy International Airport facility.

(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 2, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

[8-CA-50230 and 8-CA-50269]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION CENTER,
PRESCOTT, ARIZONA

Respondent

and

Case Nos. 8-CA-50230
8-CA-50269

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2401, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on April 21, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 10, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[8-CA-50230 and 8-CA-50269]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION CENTER,
PRESCOTT, ARIZONA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2401, AFL-CIO

Charging Party

Case Nos. 8-CA-50230
8-CA-50269

David M. Demmer, Esq.
For the Respondent

Deborah S. Wagner, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon unfair labor practice charges filed by the American Federation of Government Employees, Local 2401, AFL-CIO (herein referred to as the Union) against Veterans Administration Center, Prescott, Arizona (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region VIII, issued an Order Consolidating Cases, Consolidated Amended Complaint, and Notice of Hearing alleging Respondent violated the Statute by unilaterally changing tours of duty of bargaining unit employees without first notifying the Union and affording it an opportunity to bargain on the impact and implementation of such changes.

A hearing on the Consolidated Amended Complaint was conducted in Prescott, Arizona at which Respondent and the General Counsel were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein the American Federation of Government Employees, AFL-CIO (the National Union herein) has been the exclusive collective bargaining representative of a nationwide consolidated unit of Veterans Administration employees including employees of Veterans Administration Center, Prescott, Arizona. In addition to being covered by the terms of a collective bargaining agreement between the National Union and the Veterans Administration, the employees at Prescott, Arizona are also covered by the terms of a supplemental agreement dated January 1980 negotiated by Veterans Administration Center, Prescott and Local 2401, a component of the National Union.

In early 1985 the Outpatient Clinic at the Prescott facility was being remodeled and Respondent decided to have some of the remodeling work performed during times when the Clinic was closed. The employees involved in the remodeling normally worked from 8:00 a.m. to 4:30 p.m., Monday through Friday, which apparently closely corresponded to the times when the Clinic was normally open. Accordingly, between February and April 1985 Respondent, without notifying the Union, changed the normal shift of six bargaining unit employees on various occasions in order to accomplish remodeling in the Clinic during hours when it was not in use. Thus, four employees were assigned to work on Saturday, February 9; three on Sunday, February 11; one employee had his shift changed to the 4 p.m. to 12 midnight shift for the two week period commencing February 11; two employees had their shifts changed to 4 p.m. to 12 midnight on February 28, March 1 and March 15; and two employees were assigned to work the 4 p.m. to 12 midnight shift one day during mid-April 1985.[1] In almost every case the employee was asked to change shifts to work when the Clinic was not in use approximately two weeks in advance of the change.[2] Generally the employees were informed that money was not available to pay overtime so shift changes were necessary.[3]

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[1] Apparently compensatory time off was given for Saturday or Sunday work.

Five of the six employees involved (three carpenters, one painter, one pipefitter and one light engine operator) testified at the hearing. All five had in excess of six years service at the facility and were members of the Engineering Service Department which contains 29 unit employees.[4] Three of the five employees testified they had never before had a similar change of duty hours. One employee requested and was granted a change to a 6:00 a.m. to 2:30 p.m. shift for two weeks in August 1984 while installing attic insulation in order to work during the cooler part of the day.[5] However, another employee, light equipment operator Tom Ruddoch, testified he had his hours changed many times. Thus, for the past three years Ruddoch has had his regular hours changed to the 6 a.m. to 2:30 p.m. shift when replacing the laundry truck driver during the driver's two week vacation period and numerous other days when the driver was sick. Ruddoch also testified that twice a month in the summer months as far back as 1974 he and other employees were allowed, upon request, to change their shifts to 6:00 a.m. to 2:30 p.m. on Fridays when engaged in watering and facility cleaning. Ruddoch further testified to unspecific other occasions when he had been called in to work when not scheduled to complete a specific job. Although the record does not reveal whether the Union was notified of the shift changes testified to by Ruddoch, from the frequency and open nature of the assignments I infer the Union knew of the shift changes.

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[2] In one case the change in hours was initiated by an employee who requested he be allowed to work the 4 p.m. to 12 midnight shift.

[3] Most of the employees involved were asked by supervisors to sign a statement that they volunteered to change their tours of duty to accomplish the remodeling work. When one employee refused to sign the statement in that he felt he should be paid on an overtime basis, he was told by supervisor that he would be "written up" if he didn't sign the statement. The employee testified he understood "written up" to mean he would be charged with insubordination.

[4] The record discloses no further details as to the employment of the sixth employee other than having worked on a "pocket door" and being described as a "one of our secretaries." Further, the record gives no indication as to the overall number of employees at the facility or in the collective bargaining unit.

[5] The record is silent as to whether the Union was ever notified or aware of this change.

The record further indicates that it has been the practice to change the tours of duty of other employees in the bargaining unit at the facility in similar situations without notifying the Union. Thus, testimony reveals that such changes occur weekly with regard to the non-professional nursing staff when employees do not report to work due to sickness or emergencies and other employees must work the shift.[6] Similar shift changes have occurred in the 22 employee housekeeping section without notification to the Union.[7]

In addition, Dennis Bergstrom, Personnel Officer at the facility for almost two years credibly testified that with regard to such changes he was not aware of any case prior to the situation herein where the Union was notified of such a shift change or where the Union complained that Management was obligated to notify the Union. Indeed, Local 2401 President Roy McDonald testified that while the Union has in the past received prior notification of a one or two week shift change or a "policy" change on shifts, no notification is given in those instances where an employee is notified of a shift change for the following day. However, it does not appear that prior to filing the unfair labor practice change herein that McDonald has complained to Respondent about not receiving notice of any other changes in tours of duty described herein.[8]

In any event it is clear from the testimony of Bergstrom and McDonald that there now exists at the facility a controversy over the interpretation and application of Article XVII,Section 4 of the parties supplemental agreement, supra, and paragraph 5 B of what appears to be a facility memorandum dated May 20, 1983 dealing with tours of duty. Article XVII, Section 4 of the supplemental agreement provides:

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[6] There are approximately 40 employees in this category.

[7] Testimony reveals that Union stewards are aware of this practice.

[8] McDonald testified in a conclusionary fashion to having notified Bergstrom "that they are changing stuff like that . . ." without indicating the date or any specifics on the matter.

> "The Center shall post weekly work schedules of assigned tour of each employee working other than a normal tour of duty, at least two weeks in advance. Any changes will be shown on the work schedule and the employee will be informed by his supervisor."

Paragraph 5 B of the May 20, 1983 memorandum provides:

> "The Service Chief or designated representative must consult with employee(s) re: proposed tours of duty changes and consider employee(s) input prior to recommending a changed or special tour of duty. Change in tours of duty shall not occur until alternative scheduling efforts are considered, and until such changes in tour of duty have been approved in writing by the Medical Center Director. Requests should be made in memorandum form through Personnel Service and the Chief of Staff or Associate Director, as appropriate, to the Director. The request must show the current tour(s) of duty, proposed tour(s) of duty and comments re: the net effect of changes if implemented. Additionally, the request will certify that the proposed changes in duty tour were discussed with employees, and Union steward(s) if applicable, and the input received from the employees and/or Union officials has been considered in making the request. Service Chiefs should check with the Personnel Officer if any questions re: employee or Union input about tour of duty assignments or changes have been raised. No changes in established tours of duty will be effected without 14 calendar days prior notification of the employee(s) (and

> President, AFGE Local 2401 if appropriate), except in emergencies." (Emphasis in the original).

Thus, Bergstrom reads Article XVII to require that notification of shift changes as herein be given only to the employee and would limit Paragraph 5 B to situations establishing a tour of duty and not how people are assigned to it. McDonald on the other hand interprets Paragraph 5 B to require Union notification be given whenever an employee's schedule is changed even though McDonald acknowledges that he has not heretofore been notified of all such changes and the record contains no credible evidence that the Union demanded notice of any shift changes prior to filing the unfair labor practice charges which gave rise to this proceeding.

The record herein also contains two memoranda, one dated November 12, 1981 signed by the facility Director and the other dated March 29, 1985 signed by Bergstrom and McDonald, relative to policy and procedures for conducting consultations/negotiations between Respondent and officials of Local 2401. Both documents contain, inter alia, the following language under the caption "Policy":

> "Management will offer the exclusive representative of employees the opportunity to consult and bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting such employees. Matters appropriate for consultation shall include personnel policies and practices and matters affecting working conditions which are within the authority, discretion and control of Medical Center management. Not appropriate for consultation or negotiation are such areas of management discretion as the numbers, types, and grades of employees; or positions assigned to any organizational segment, work project, or tour of duty; or on the technology, methods and means of performing work."

Discussion and Conclusions

Counsel for the General Counsel contends Respondent violated the Statute when it made the changes in tours of duty in February through April, above, without providing the

Union with prior notice and an opportunity to bargain on the impact and implementation of the changes. Respondent contends that the Union waived its right to bargain on such matters when it executed Article XVII, Section 4 of the supplemental agreement, supra, and urges that its prior practice of not notifying the Union on such temporary changes supports this interpretation. Respondent also contends it had no duty to give notice of the changes to the Union since the impact of the changes was de minimis. Further, Respondent takes the position that any requirement to negotiate with respect to shift changes would be inconsistent with Government-wide regulation 5 C.F.R. § 610.121(b)(2) (1984), which provides:

> "(2) When the head of an agency knows in advance of an administrative workweek that the specific days and/or hours of a day actually required of an employee in that administrative workweek will differ from those required in the current administrative workweek, he or she shall reschedule the employee's regularly scheduled administrative workweek to correspond with those specific days and hours. The head of the agency shall inform the employee of the change, and he or she shall record the change on the employee's time card or other agency document for recording work."9/

9/ I fail to see how this regulation and argument with regard thereto has any bearing upon the matter at issue herein. This case deals with an allegation that Respondent failed to fulfill its bargaining obligations by notifying the Union of changes in hours so that the Union might make a request to negotiate if it so desired and put forth proposals dealing with the impact and implementation of the changes. So far as this case is concerned no limitation is placed upon the right of Respondent to reschedule hours and the negotiability of any particular proposal is not at issue. Simply because Respondent is privileged to act does not mean Respondent is not obligated to notify the Union of the decision and afford it an opportunity to put forth proposals on matters concerning impact and implementation. The negotiability of those proposals would be another matter. Accordingly, Respondent's contention in this regard is rejected.

It is well settled that a change in work schedules of employees carries with it the obligation to provide the exclusive collective bargaining representative with timely and meaningful notice of the change so that it may, if it so desires, bargain with the employer about matters concerning at least the impact and implementation of the change. Cf. Internal Revenue Service, Austin Service Center, 2 FLRA 769 (1980); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116 (1982); Headquarters, 77th U.S. Army Command, Fort Totten, New York, 9 FLRA 762 (1982); Department of Transportation, Federal Aviation Administration, Washington, D.C. and its Chicago Airways Facilities Sector, 16 FLRA 479 (1984); and Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA No. 107 (1985). It is also well settled that the requirement that an employer notify and bargain with the collective bargaining representative may be waived and therefore extinguish bargaining obligations if it can be shown that the exclusive representative clearly and unmistakably waived its statutory rights regarding the matter in dispute. Library of Congress, 9 FLRA 421 (1982); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). However, while the question of the existence of a waiver is frequently resolved by reference to the contractual language agreed to by the parties to an agreement, the inquiry does not always end there. Thus, the parties' practice concerning the matter must also be examined in order to ascertain whether a change in a condition of employment in fact occurred, or whether, regardless of the contractual language, the conduct complained of was merely a continuation of an ongoing practice the repeat of which reflects no change in a condition of employment and therefore creates no further obligation to notify the union. Cf. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 9 FLRA 784 (1982); and see Department of the Air Force, Scott Air Force Base, Illinois, supra, at 22, 23 and Department of the Treasury, U.S. Customs Service, Region I (Boston, Massachusetts), 16 FLRA 654 (1984) at 666.

In the case herein I conclude that the changes in work schedules, as fully described above, were clearly the type of changes which would normally create an obligation on the part of Respondent to notify the Union and provide it an opportunity to bargain on the impact and implementation of the changes, as alleged. I further conclude that Article XVII, Section 4 of the supplemental agreement, supra, does not, in and of itself, establish a clear and unmistakable waiver by the Union of its right to be notified of such changes. The mere fact that the section requires supervisory notification to the employee does not carry with it the "clear and unmistakable" implication that the Union, by entering into the agreement, was giving up its right to be notified of such changes. The section addresses only the obligation Respondent has to the employee and is silent on its obligation to the Union. Silence, without more, does not create a clear and unmistakable waiver.

However, the record clearly establishes that during at least the last two years management has frequently changed temporarily the shift hours of various employees at the facility in situations similar to or approximating those which occurred herein without giving notice to the Union.[10] Thus, two of the five witnesses from the Engineering Service Department who testified they had their schedules changed testified to prior changes in schedules. Indeed, one of these witnesses, Ruddoch, testified to shift changes during summer months which affected other employees as well. In addition, shift changes were relatively common in other departments at the facility during this period without notification to the Union. Further, the record contains no credible evidence that, prior to the filing of the unfair labor practice charges herein, the Union ever protested management's failure to provide advance notice to the Union when individual employees had their work shifts changed on a temporary, limited, individual basis to perform designated functions when the employee's normal shift was not changed for an extended period.

Accordingly, in all the circumstances herein I conclude that Respondent's failure to notify the Union concerning the shift changes which gave rise to the Complaint herein did not constitute a change in an established condition of employment, but rather, was consistent with established past practice and therefore did not violate the duty to bargain under the Statute. Id.[11] I therefore recommend the Authority issue the following:

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[10] I conclude these changes were made without notification to the Union based upon the credited testimony of Bergstrom and from the general thrust of the testimony and presentation of evidence taken as a whole.

[11] In view of this disposition I need not reach the question of whether the impact of the shift changes herein were *de minimis*. Further, it would seem from the parties' conflicting interpretations of the supplemental agreement and memoranda, *supra*, that this dispute was one more appropriate for resolution under the parties' grievance and arbitration procedures contained in their collective bargaining agreement than an unfair labor practice under the Statute.

ORDER

IT IS HEREBY ORDERED that the Consolidated Amended Complaint in Case Nos. 8-CA-50230 and 8-CA-50269 be, and hereby is, dismissed.

Salvatore J. Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: April 21, 1986
Washington, D.C.

9-3/no. 61

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 61

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

July 3, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 3-CA-50435 (June 27, 1986)

Social Security Administration, Office of Hearings and Appeals and American Federation of Government Employees, Council 215, AFL-CIO

Case No. 2-CA-60082 (June 30, 1986)

United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York and American Federation of Government Employees, AFL-CIO, Local 3148

Case Nos. 5-CA-50312 (June 30, 1986)

Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3. F31/21-3.

[3-CA-50435]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Respondent

and

Case No. 3-CA-50435

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 215, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on April 4, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 27, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[3-CA-50435]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
COUNCIL 215, AFL-CIO

Charging Party

. . . .

Case No.: 3-CA-50435

Richard Matthews and
Jay Clary
For the Respondent

Ana de la Torre, Esquire
Bruce Rosenstein, Esquire
For the General Counsel

Bruce Ransom, Jr.
Mark Anderson
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on October 28, 1985 by the Regional Director for the Federal Labor Relations Authority, Region III, Washington, D.C., a hearing was held before the undersigned on December 4, 1985.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, *et seq.* (herein called the Statute). It is based on a Third Amended Charge filed on October 13, 1985 by American Federation of Government Employees, Council 215, AFL-CIO (herein called the Union) against Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals (herein called the Respondent).

The Complaint alleged, in substance, that Respondent (a) on or about July 29, 1985, unilaterally implemented changes in working conditions, and the agency failed and refused to negotiate with the Union re the impact and implementation of such changes (b) by unilaterally implementing changes in working conditions on or about July 29, 1985, the agency failed and refused to cooperate in impasse procedures[1] all in violation of Section 7116(a)(1), (5) and (6) of the Statute.

Respondent's Answer, dated November 7, 1985, admitted making changes in conditions of employment but denied a refusal to negotiate thereon as alleged, and it denied a failure or refusal to cooperate in impasse procedures. Further, the Answer denied the commission of any unfair labor practices.

All parties were represented at the hearing.[2] Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

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[1] The Complaint recites that on or about July 22, 1985, at a time when Respondent and the Union discussed the Union's bargaining proposals, the Union requested the services of the Federal Mediation and Conciliation Service (FMCS). Implementation of changes while services of FMCS were involved is alleged as failure or refusal to cooperate in impasse procedures pursuant to 7116(a)(6).

[2] At the outset of the hearing Respondent moved to dismiss the Complaint in respect to the alleged implementation of changes while the matter was before the Federal Mediation and Conciliation Service. It contended that a matter must be pending before the Federal Service Impasses Panel in order to charge an agency with implementing a changed working condition. The motion was denied at the hearing. Consideration of the Respondent's contention as to this issue will be treated *infra*.

READEX FICHE best copy available

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein American Federation of Government Employees, AFL-CIO has been the certified exclusive representative of nationwide consolidated units of Respondent's professional and non-professional employees.

2. At all times material herein the Union has been, and still is, the agent of American Federation of Government Employees, AFL-CIO for the purpose of exclusively representing the bargaining unit employees who are employed in Respondent's Office of Hearings and Appeals.

3. Respondent and American Federation of Government Employees, AFL-CIO, are parties to a national collective bargaining agreement, in existence at all material times herein, covering unit employees of Respondent. Said agreement provides, inter alia, that Respondent will provide the American Federation of Government Employees, AFL-CIO with reasonable notice of changes, prior to implementation thereof, affecting working conditions; that the said union will notify management of a desire to negotiate on the change, submit written proposals within a reasonable time; that bargaining will commence as soon as possible; and that all issues not resolved will be referred to the Federal Service Impasses Panel for resolution. (G.C. Exhibit 10, Article 4, Section 1). The said agreement also provides that proposed changes which affect any one component will be dealt with at the component level; that the union representative will be given timely notice of proposed component-wide management initiated changes. (G.C. Exhibit 10, Article 4, Section 3).

4. Prior to July 29, 1985 there were employed at Respondent's Office of Hearing and Appeals in Arlington, Virginia individuals entitled "Contact Representatives." A group of about five such employees comprised a telephone unit, and their function was to handle exclusively phone calls of a critical nature. These calls involved such matters as a suicide, dire financial need, evictions, terminal illness, et. al. The grade structure for said Contact Representatives (CRs) was GS 5 through 7.

5. Employed within the Congressional and Public Inquiries Branch (CPIB) at the Office of Hearings and Appeals are GS-9 analysts. Their traditional function has been to reply in writing to correspondence re pending cases. The inquiries in this regard generally are from Congress and the public. At times the analysts may receive or make telephone calls in connection with such inquiries. Involved herein in the unit are about 25 analysts, and writer Janet Watson testified she handled about 24 cases per week in 1985.

6. On June 24, 1985[3] one of the employees handed Sandra Belin, 2nd vice-president of AFGE, Local 3615, a memo she received from a supervisor. That memo, dated June 24, was addressed to the Section B unit of CPIB. It recited that "beginning this week Section B will be sitting in the telephone section on a regular basis per the attached schedule." The schedule called for rotating 10 analysts in CPIB for different periods of time between June 24 and January 3, 1986, in order to cover the telephone unit. (G.C. Exhibit 2).

7. Under date of July 2 Bruce C. Ransom, Jr., President of AFGE, Local 3615, wrote a letter to Albert K. Buhl, Respondent's Chief of Labor Management Relations. It was stated therein that the Union learned of management's intention to: (a) regularly detail CPIB analysts to the Telephone Unit to perform functions of the Contact Representatives; (b) move Contact Representatives from the Telephone Unit to writing units. The letter further recited that the Union wished to bargain on the impact and implementation of the intended changes, and specific information was requested of management prior to bargaining.

Included in the aforementioned Union letter were nine proposals regarding "Coverage of Telephone Unit by Writing Unit". Most of these were protective in nature on behalf of the analysts when the latter were detailed, as planned by management, out of their unit.[4]

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[3] Unless otherwise indicated, all dates hereinafter mentioned occur in 1985.

[4] These proposals were either subsumed, or modified, by later ones submitted by the Union on July 19, which are hereinafter mentioned.

8. Ransom followed up the Union's initial letter by a second written request on July 10 from the Union to bargain on the proposed "Coverage of Telephone Unit by Writing Unit."[5]

9. Under date of July 12 Buhl responded to the aforesaid requests by sending a memo to Ransom. He stated therein that although CPIB analysts are being regularly detailed into the Telephone Unit to perform Contact Representative functions, the CRs are moved on corresponding dates from the Telephone Unit to the writing units to work on their own case load. Buhl also supplied information pursuant to the Union's request. Further, the memo stated that the impact upon employees would be de minimis; that if the Union could show otherwise, management would meet and discuss the matter.

10. Under date of July 17 Respondent sent written notification of the proposed changes to Ransom. It advised the Union that: (a) GS-7 CRs will be reassigned to Congressional and Public Inquiry Technician, GS-7 positions; (b) GS-9 CPIB Analysts will be rotated into the Telephone Unit to perform telephone inquiry duties (5 at a time for 90 days at a time); (c) GS-7 CRs will receive their performance appraisals upon reassignment to CPIB Technician positions. New performance standards will be prepared and forwarded to the Union. CRs will not be rated on the CPIB Technician position until they have performed for 120 days.

11. In a letter dated July 19, which was addressed to Buhl, Union official Ransom again recited that the Union wished to bargain on the impact and implementation of the intended changes involving "Coverage of Telephone Unit". Information was requested of management. Further, the Union made 22 proposals re the reassignments and details. These covered such items inter alia, as: the effect of the detail upon the employees' status, limited duties for physically handicapped employees, a time limitation for the detail, suspension of ratings for employees until standards and position descriptions are finalized, and that progress reviews be given 90-120 days after a new performance record.

12. Buhl testified, without contradiction, that on July 19 he spoke with Ransom and Belin; that they discussed the Union's proposals, and the Union requested delaying

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[5] This was a general request with no specific items mentioned, but it referred to the July 2 request to bargain.

implementation pending further negotiations. Buhl testified, further, that he agreed to delay implementation for one week from the planned date of July 22 if Mr. Anderson and Ms. Belin were given full authority to negotiate and come to an agreement with management.

13. In a memorandum dated July 19 Buhl wrote Belin as follows:

> This is to confirm our telephone conversation of July 19, 1985 at which time it was agreed that the parties would meet to negotiate the impact and implementation of a management proposal regarding placement of employees within the Congressional & Public Inquiry Branch on Monday, July 22, 1985 at 10:30 A.M. in Room 201A of the IBM Building. As I indicated to you in this conversation, management has agreed to delay implementation of its proposal until Monday, July 29, 1985 or until an agreement is reached between the parties involved, whichever comes first. (Underscoring supplied).

14. Although Respondent gave no specific date of implementation when it notified the Union of its intended implementation,[6] management did convey to the Union officials on July 19 that Respondent had intended to implement the changes on July 22. No response was made to the July 19 memo to Belin, nor does the record reflect that the Union officials objected on July 19 to delaying the implementation for one week. In view of the foregoing testimony and correspondence, I find that the Respondent planned to implement the changes in the coverage of the telephone unit on July 22; that the Union was aware of this plan prior thereto; that management agreed to delay implementation until July 29, and that no objection to this agreement was made by the Union.[7]

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[6] While Respondent's brief recites that Joint Exhibit 1 reflects notification to the Union that the changes will be implemented on July 22, I find no such notice in said exhibit.

[7] In its brief General Counsel recites that "Respondent agreed to delay implementation from July 22 until July 29". (Page 3).

15. The parties met on July 22 and discussed abolishment of the CR position, the Union's proposals, and the adverse impact regarding employee Sue Quick. Management also provided some information which the Union requested. In respect to the Union proposals, Respondent gave its position as to each one and explained whether or not the proposal was acceptable; if rejected, an explanation was given by management.

16. Under date of July 24 Respondent sent 15 counterproposals to the Union regarding coverage of the telephone unit. Some were proposals not discussed theretofore, while others constituted modification of proposals made by the Union.

17. On July 24 Buhl talked to Belin. He told the Union representative that management wanted to get together with the Union as Respondent still intended to implement on July 29; that the parties should sit down and discuss their differences as reflected in the proposals submitted that day by management. Belin assented and stated that the Union had contacted the Federal Mediation and Conciliation Service (FMCS).

18. In a memorandum dated July 24 Buhl sent Belin a list of 15 counterproposals re proposed changes concerning Coverage of the Telephone Unit. Nearly all of these counterproposals addressed the Union's proposals of July 19. In those instances some counterproposals adopted the language or concept advanced by the Union. Certain of the Respondent's counter-proposals modified the Union's proposals or added qualifying language.[8] There were four Union proposals not addressed by management: Number 6, wherein the Union proposed that the CRs not be transferred, but stay in place and make initial calls; Number 8, wherein the Union proposed that no Union official be assigned to the telephone unit; Number 11, wherein it was proposed that OPM classify the CPIB analyst position; Number 17, wherein it was proposed that processing of incentive awards be done in a timely and expeditious manner.

19. On July 24 the Union filled out and submitted to the Federal Mediation and Conciliation Service a Form F-53.

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[8] No counterproposal was made by management in respect to one of the Union's proposals which constituted a request for statistical and evaluation study evaluating the changes.

This is entitled "Notice to Federal Mediation and Conciliation Service", and notifies the FMCS that "we desire" to enter into an initial agreement. The names of both the Union and Respondent herein were set forth in the notice.

20. John Wagner, a mediator with FMCS, telephoned Buhl on July 24 and informed him that the Union had contacted FMCS. Buhl told Wagner that management had given proposals to the Union, was awaiting a response, and would like to get together and meet with the Union since the intention was to implement the changes on July 29. Wagner stated he would try to set up a meeting and then contact Buhl thereafter.

21. No arrangements were made by the parties to meet prior to July 29 and the intended changes re coverage of the Telephone Unit were implemented on that date.[9]

22. On August 16 the Union submitted to Respondent, in respect to the subject of "Rotation of Analyst to CPIB Telephone Unit", 13 counterproposals (Joint Exhibit 6). Nine of these proposals were ones previously proposed by the Union on July 19, whereas four were new proposals.[10]

23. Both the Union and Respondent met with Mediator Wagner on August 16. While no details of the meeting appear in the record, the parties did discuss the Union's initial proposals and Respondent's counterproposals. No agreement was reached.

24. In a memorandum dated August 26 Respondent submitted to the Union its response to the counterproposals which the Union gave to management on August 16. The response addressed each of the Union's 13 counterproposals. It stated that proposals # 1, 3, 4, 6, 11 and 13 were non-negotiable since they interfered with management's right to assign work. While Respondent agreed to one proposal and modified another, it stated that one proposal was

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[9] Buhl testified that the assignment of work and people was effected on July 29, but some of the matters brought to management's attention by the Union were not implemented because of their nature.

[10] One of the proposals concerned Contact Representatives, and the Union proposed that those CRs disadvantaged by the initiative be promoted.

unclear. In respect to a request for an evaluation study, management insisted that none existed.

25. On August 30 the Union sought to invoke the services of the Federal Service Impasses Panel (FSIP). However, it filled out the FMCS forms in error. Accordingly, on September 27 the Union again requested FSIP services by filling out a correct form.

26. Under date of October 10 Respondent wrote FSIP and asserted in its letter that FSIP should not take jurisdiction of the matter. It contended that: (a) the decision to detail was a management right; (b) the parties had negotiated procedures for detailing employees; (c) no impasse was reached; (d) any impact upon employees was *de minimis*; (e) the Union had filed an unfair labor practice on July 18.

27. In a letter dated November 20 FSIP wrote the Union that it declined to assert jurisdiction. Its decision was predicated upon the conclusion that it was not clear an impasse existed. FSIP's letter stated that the issue re Respondent's obligation to bargain must be resolved in the pending unfair labor practice proceeding before it could be determined whether the parties were at impasse.

Conclusions

The basic contentions by the General Counsel are twofold in nature. It is asserted that by implementing the changes on July 29 involving the CPIB Analysts and the Contact Representatives, at a time when the parties were before the Federal Mediation and Conciliation Service, Respondent has failed and refused to cooperate in impasse procedures in violation of Section 7116(a)(6) of the Statute. Further, General Counsel urges that Respondent failed to bargain in good faith in violation of Section 7116(a)(5) of the Statute when it unilaterally implemented said changes on July 29 in the midst of negotiations.

(1) The first contention is predicated upon the argument that "impasse procedures", as set forth in 7116(a)(6), includes procedures taking place before, and with the assistance of, the Federal Mediation and Conciliation Service. Thus, General Counsel urges that decisional law, which requires an agency to maintain *status quo* and not implement changes while the parties are before the Federal Service Impasses Panel, should equally interdict such implementation while the parties were before, and being assisted by, the FMCS.

Although no case has been brought to my attention determinative of this contention, it is noted that there is a significant difference in the resultant effect when a party utilizes the services of FMCS rather than FSIP. As set forth in 7119 of the Statute, a party may request assistance from FSIP after voluntary arrangements fail to resolve a negotiation impasse. Once such assistance is sought, the parties are bound by any final action taken by the Panel. Moreover, once the case has been filed, it may not be withdrawn from the Panel without the latter's approval, and the Panel also has broad authority, under Section 7119(c)(5)(B)(iii), to take whatever action is necessary and not inconsistent with 5 U.S.C. 71. Voluntary procedures for settling a dispute involve the FMCS and no statutory provision exists for rendering final action by it, which shall be binding upon the parties. It is perforce a voluntary arrangement which either party may withdraw from at will.

Decisional law in the public sector has, however, made it clear that while a negotiation dispute with respect to intended changes by management was pending before FSIP, an agency is required to maintain status quo re such changes unless it be required to implement a change as a necessary function of the agency. Failure to do so results in an agency having violated 7116(a)(1), (5) and (6). Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA No. 61; Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859. In the cited cases implementation of the change, it was concluded, constituted a failure to allow the Panel to take appropriate action, and this was deemed a failure to cooperate with impasse procedures in violation of 7116(a)(6) of the Statute.[12]

An examination of the legislative history of 7116(a)(6) of the Statute does not shed any light on whether the term "impasse procedures", as set forth therein, encompasses procedures before FMCS. Reference in such history to Section 7119, which provides for FSIP, does state that the Panel is empowered to resolve impasse disputes and procedures are devised therefor, whereas the role of FMCS is confined to assist in the resolution of disputes between the parties.

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[12] The Union, in the Department of the Treasury case, supra, sought the assistance of the FMCS prior to its invoking the services of FSIP.

The undersigned is persuaded that the aforementioned term is referable to impasses which are before FSIP for consideration, and 7116(a)(6) is not intended to include situations where a party has invoked the services of the FMCS.[13] Although it is true that an impasse may exist when FMCS is called upon to assist in resolving a dispute, no authority is vested in it to make a final or binding determination. Thus, neither party is obliged to "cooperate" in procedures established by FMCS, and the latter - as distinguished from FSIP - is not empowered under the Statute to hold hearings, take testimony, and utilize necessary actions to resolve an impasse. Since FSIP is clothed with such authority, it seems logical to assume that it is the failure to abide by its procedures, rather than those of FMCS, which may result in a flouting of the Statute by the transgressor. I so conclude.

Turning to the case at bar, I am not persuaded that, based on the facts, there is any validity to the position that an impasse existed when the Union invoked the services of FMCS on July 24 and the implementation occurred on July 29. It was on July 24 that Buhl told Union representative Belin that the parties should sit down and discuss their differences on the proposals submitted that day by management. Belin agreed, and Buhl informed mediator Wagner on that date that management was awaiting a response from the Union and wanted to get together with the latter that week. At this point, and in light of the proposals and counterproposals by each party, it cannot be concluded that an impasse existed, and no change in circumstances took place prior to July 29. Thus, assuming _arguendo_ that 7116(a)(6) of the Statute was intended to include impasse procedures before _FMCS_, I would find no violation thereof by Respondent since no impasse existed at the time of implementation.[14] Further, since I have concluded that "impasse procedures" under the Statute refers to proceedings pending before FSIP, it is determined that - assuming the parties had reached an impasse in their negotiations -

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[13] Since the Panel may issue binding _directives_ to the parties, it is reasonable to conclude that _failure to cooperate_ in impasse _decisions_, which is violative of 7116(a)(6), refers to FSIP decisions.

[14] It is noted that FSIP concluded, albeit at a later date, that it was not clear the parties had reached an impasse in negotiations.

Respondent did not fail to cooperate in such procedures by implementing the changes while utilizing the services of FMCS.

(2) A further contention is made that, apart from a failure to abide by the impasse procedures while the services of FMCS had been invoked, Respondent unilaterally implemented the changes on July 29 during negotiations in violation of 7116(a)(1) and (5) of the Statute. General Counsel insists that the changes re the CPIB analysts and the contact representatives, which management instituted, were put into effect on July 29 without Respondent having bargained in good faith concerning their impact and procedures for implementation.

The first official announcement from Respondent concerning the planned changes was sent to the Union on July 12. However, as record facts disclose, the Union learned of the contemplated changes beforehand and requested, on July 2 and 10, that management negotiate the impact and implementation thereof. While the agency sent further notification to the Union on July 17 re the proposed changes, the parties did not confer until July 19 in regard thereto. It is noted that, in addition to the Union's submission of 22 proposals involving the reassignments, the parties agreed to meet on July 22 to discuss the changes. Further management agreed, on July 19, to postpone implementation from July 22, as planned, "until Monday, July 29 or until an agreement is reached between the parties involved, whichever comes first." Thereafter, the Union and Respondent met on July 22 and discussed the proposals made by the Union. Based on Buhl's testimony, which is uncontroverted, management went over each such proposal and pointed out which ones were or were not acceptable. In respect to those proposals it rejected, Respondent stated the basis for its rejection.

All of the circumstances herein, including the facts recited above, persuade me that Respondent did not fail or refuse to bargain in good faith with respect to the changes concerning the CPIB Analysts and the contact representatives. Although Respondent initially took the position that the intended changes were de minimis in nature but agreed to negotiate them if shown otherwise, it later did meet and confer with the Union re the latter's proposals. Moreover, management went over each of them and indicated its objections to those not acceptable. Further, Respondent made counterproposals to the Union on July 24 which addressed the Union's proposals of July 19, and also either accepted parts of the Union's ideas or modified same.[15]

Although it is asserted that Respondent "rushed" into implementing the proposed changes, the Union was aware by, at least, July 19 that management intended to implement the changes on July 29. Moreover, despite Respondent's agreement to defer implementation until that date, no objection was made by the Union to such postponement nor did it request any further delay by the agency. Those factors warrant a reasonable inference that the Union tacitly assented to the implementation of the changes on July 29.

Note is taken by the undersigned of the Authority's decision in Social Security Administration, Office of Hearings and Appeals, Region II, New York, N.Y., 19 FLRA No. 47. The parties therein bargained to impasse over the union's proposals, and the employees agreed to FMCS assistance. While continuing to cooperate with FMCS, the Respondent therein implemented a relocation of the office to avoid unnecessary expense. It also continued to seek a resolution of the dispute by participating in proceedings before FSIP. The Authority held that, under those circumstances, it could not be concluded that management failed in its obligation to negotiate in good faith. The cited case has considerable applicability in determining whether Respondent in the instant case flouted its bargaining obligation. While it may be argued that implementation herein was not necessary for the agency to function,[16] Respondent effected the changes due to the complaints re telephone service emanating from Congress, its staffers, or the public. Further, management herein accepted the intercession by FMCS and was prepared to meet with that agency before implementation. Record facts also disclose that both parties met with an FMCS representative on August 16 and discussed both the Union's proposals and Respondent's counterproposals. Negotiations continued thereafter, and on August 26 the employer addressed each of the Union's counterproposals.17/ Since the parties could not reach agreement, the Union finally invoked the services of FSIP on August 30.

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[15] In respect to the Union's four proposals of July 19, which were not addressed by Respondent in its memo of July 24, I do not conclude such failure to be indicative of bad faith bargaining. Two of these proposals went to the decision itself and one involved proposed action by OPM and not Respondent. The proposal to process incentive awards in a timely manner was not the subject of any difference of opinion.

[16] This test, as enunciated by the Authority in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., supra, applied where issues were pending before FSIP at the time of implementation.

All of the foregoing factors, including an implied assent to the implementation on July 29 by the Union as well as the continual negotiations between the parties even with the assistance of FMCS, convinces me that Respondent adhered to its duty to bargain re the impact and implementation of the changes effected herein by management.

Accordingly, it is concluded that Respondent did not violate 7116(a)(1), (5) and (6) as alleged herein.

It is therefore recommended that the Authority issue the following Order:

ORDER

It is hereby Ordered that the Complaint in Case No. 3-CA-50435 be, and the same hereby is, dismissed.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: April 4, 1986
Washington, D.C.

17/ While the record reflects the negotiations occurred up until August 30, the alleged refusal to bargain as set forth in paragraph 12 Complaint, is based on the implementations on July 29 after failing and refusing to negotiate in good faith re the proposed changes.

[2-CA-60082]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF
JUSTICE, BUREAU OF PRISONS,
METROPOLITAN CORRECTIONAL
CENTER, NEW YORK, NEW YORK

Respondent

and

Case No. 2-CA-60082

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3148

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on May 20, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed. In the "Notice of Transmittal of Decision", the Administrative Law Judge stated, in pertinent part, that "the filing of exceptions to the attached Decision, is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27", and advised in the Notice that, "Any such exceptions must be filed on or before June 19, 1986, and addressed to:

Federal Labor Relations Authority
500 C Street, SW., Docket Room 213
Washington, D.C. 20424"

No exceptions were filed with the Authority within the prescribed time limit. Instead, the Charging Party's exceptions dated and postmarked June 19, 1986, were filed with the Authority at the above address on June 23, 1986.

Section 2429.21 of the Authority's Rules and Regulations provides, in pertinent part:

> When this subchapter requires the filing of any paper, such document must be received by the Authority

> . . . before the close of business
> on the last day of the time limit,
> if any, for such filing . . . .

Thus, under the Authority's rules of procedure, date filed means date received by the Authority.

The Authority finds that no exceptions to the Decision and Order of the Administrative Law Judge were filed with the Authority within the time limits prescribed for such filings. Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 30, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, METROPOLITAN CORRECTIONAL CENTER, NEW YORK, NEW YORK

Respondent

and

Case No.: 2-CA-60082

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3148

Charging Party

. . . .

Yvonne Hinkson, Esquire and
Martha Jordan
For the Respondent

E. A. Jones and
Joel M. Hornstein, Esquires
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq. (herein called the Statute). It was instituted by the Regional Director of Region 2 based upon an unfair labor practice charge filed on December 3, 1985, by the American Federation of Government Employees, Local 3148, AFL-CIO (herein called the Union), against the U.S. Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York (herein called the Respondent). The Complaint alleged that Respondent violated section 7116(a)(1), (2) and (8) of the Statute by denying the request of a bargaining unit employee to be represented by the union at an examination in connection with an investigation which the employee reasonably believed could result in disciplinary action; by proposing to suspend and suspending the employee because he refused to participate in the above-mentioned examination; and by making a statement to the above employee to the effect that there would be discipline because he had refused to participate in the examination in connection with an investigation which the employee reasonably believed could result in disciplinary action.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in New York, New York at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the Respondent and the General Counsel and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

Rene Hernandez is a correctional officer, who has been employed by Respondent for about six years. Hernandez is also a union steward. During October 1985, Hernandez was directly supervised by Captain Ralph Humme and Lieutenant Stephen R. Rhoades. Also during October 1985, Douglass Lansing was the Warden at Respondent's facility and Joe Brooks was the Associate Warden for Operations.

According to Officer Hernandez, on October 25, 1985 while he was working the 4 pm to 12 pm shift a disturbance occurred at about 6 pm in the maximum security area (Unit 9 South) in which he was working. At the time the disturbance occurred, Hernandez states that he was sitting at his desk preparing inmate log entries.[1] Because of the sensitive nature of the log books, Post orders or guidelines require that they be either kept in the officers possession or in a locked closet when unattended.

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[1] The log entries are a unit diary containing incidents in the area and other pertinent information. The log book information is considered confidential.

In responding to the commotion in his area, Hernandez left his log book unattended. Hernandez reasoned that the situation required his immediate attention. However, while in the area, he was approached by Associate Warden Brooks and duty officer Rick Olson. Associate Warden Brooks asked Hernandez "what was the log book doing left out." Hernandez states that he glanced over the other officer's desk[2] and told Brooks, "I had no explanation for him right now." Brooks then called Hernandez' supervisor, a Lieutenant Blanchard, who came to the area. Brooks told Blanchard what he had found and gave the log books to Blanchard.

Mr. Olson left the matter to Blanchard who then questioned Hernandez about what had happened. Blanchard requested that Hernandez put his position in a memorandum. Hernandez did not request union representation at that time. The memorandum states that Hernandez responded to a disturbance in the pantry area of Unit 9-South, that he defused the situation and had begun counseling several inmates when Mr. Brooks and Mr. Olson entered the area. It also states that Mr. Brooks asked him "what was the log book doing laying on my desk unattended and the cabinet open." Hernandez defended his action by stating that "the situation was created by the development of the incident. . . ."

The meeting about which Hernandez was allegedly denied union representation occurred on October 31, 1985 between Hernandez and Lieutenant Stephen Rhoades. Rhoades had recently transferred into the facility and apparently had not met Hernandez prior to this meeting. Since a credibility problem exists portions of the testimony of both witnesses concerning the meeting are extracted. Hernandez testified as follows:

> So I had gone into the Lieutenant's office and Lieutenant Rhoades approached me. He said the Captain wanted me to submit another memo pertaining to the incident of October 25th.
>
> Q. And what reply, if any, did you make to Lieutenant Rhoades?

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[2] Another officer in the area was also keeping a population log book which did not contain sensitive information. However, Associate Warden Brooks apparently collected both books.

A. I first told Lieutenant Rhoades I feel that the first memo I submitted to him was plain enough and I wasn't going to write another memo.

Q. And what else if anything did you say?

A. And then I got a little heated there, and I requested that; then he turned around and he says, well, you're going to have to write a memo.

Q. And what reply, if any, did you make?

A. I told him, I said, if I have to write another memo, I would like a union representative.

Q. And what reply, if any, did Lieutenant Rhoades make?

A. Lieutenant Rhoades says no.

Q. Is that all he said?

A. He said, no, I wasn't going to have a union representative.

Q. And then what was said?

A. There were a few exchanged words. I told him, I said, this is why the officers here don't want to come to work because the people are always fucking with them. I told him he had good officers here and they would do their jobs if they just left them alone.

And then he again insisted that I write the memo and I refused again. Again he threatened me to write me up. At that point, I told Lieutenant Rhoades, if you want a memo, I'll give you a memo. And I wrote down the memo, I respectfully refuse to give you any more information pertaining to the incident until I speak with the warden.

Q. You just testified that Lieutenant Rhoades threatened you again. Could you relate the first time that Lieutenant Rhoades threatened you?

A. Well, when Lieutenant Rhoades asked me to write the memo, I refused. And then he said, if I didn't write the memo, he would write me up.

Q. What does that mean, write me up?

A. That means he would prefer charges against me.

Q. Okay. Then why don't you just continue the sequence and describe what happened.

A. Okay. After he threatened to write me up, all right, I told him, I want a union representative. I said; then he says, you're not going to get one. And then I got a little hot under the collar. That's when I made the statement that, you know, that's why the officers don't want to come to work over here because they're always fucking with them.

Q. You testified that you subsequently did write a memo. I'm going to show you what's marked into evidence as General Counsel Exhibit 3 and ask you if you can identify it.

A. This is a memo I gave to Lieutenant Rhoades upon his request.

Q. In the memo you state that you did not want to write any more memos until you spoke with the warden. Now why did you state that?

A. Warden Lansing had just arrived at the institution. I felt that Warden Lansing was an honorable and respectful man that I could trust.

Q. Why didn't you state in the memo you wanted union representation because that is what you had previously told Lieutenant Rhoades?

A. I didn't state it in the memo because at the time; I wrote the memo in anger. You know, I was like badgered into writing the memo so I just gave him something to satisfy him for that particular moment.

Q. At that point, what was your desire, if any, for union representation?

A. Would you repeat that?

Q. At that point when you were talking with Lieutenant Rhoades, what was your desire, if any, to have union representation?

A. I wanted to make sure that I wasn't going to incriminate myself in any way by writing a second memo so I wanted to see counsel, from a union representative, to see if they could legally do this.

Q. What happened after you wrote the memo?

A. The second memo?

Q. Correct.

A. I left the area and went back to my post.

Q. At any time did Lieutenant Rhoades offer to stop so you could obtain union representation?

A. No he did not.

Q. At any point in your conversation with Lieutenant Rhoades, did you tell him you didn't want union representation?

> A. No. I did not.

Rhoades recalled the meeting as follows:

> A. Mr. Hernandez came into the office and I explained to Mr. Hernandez what the Captain had said, yes ma'am.
>
> Q. Exactly what did you say to Mr. Hernandez at that time?
>
> A. I told Mr. Hernandez that the Captain wanted him to write a memorandum stating that there was a difference in, you know, what he told Mr. Brooks in connection with what he told him and he wondered as to why, you know, why the difference was, and why he told Mr. Brooks one thing and wrote him something else.
>
> Q. What was Mr. Hernandez' response at that time to that statement?
>
> A. You know, he; I don't remember just exactly all his words, but he used a lot of swear words towards Mr. Brooks and so forth, and so on. Then he said to me something to the effect that maybe he would see a union rep first, and I told Mr. Hernandez, you know, whatever he wanted to do. The only thing I wanted to know is was he going to write the memo.
>
> And then he said, well, he wanted to talk to the warden first about it. Then he got into some more swearing about the administration. Basically what I told him was, Mr. Hernandez, the only thing I want to know is, are you or are you not going to write the memo? That's the only thing I'm interested in. That's all the Captain wants me to do, you know, that's all that I'm concerned about at the present time.
>
> He wrote out finally something to the effect that he was going to see the warden. I give it to the Captain and that's basically it.

Q. And that was the end of your involvement with the incident?

A. Yes ma'am. It took approximately I would say no more than ten minutes.

Q. No[w] going back you stated that Officer Hernandez said he was going to see his union representative.

A. He said something to the effect well maybe, you know, I'm not going to write something that's going to strengthen y'all's cases or something like that. He said maybe I need to see a union rep.

I said, you know, that's fine, Mr. Hernandez. Just, you know, tell me what you're going to do. You know, are you going to do that, are you going to write the memo? What are you going to do? You know, in between this time, you know, he was swearing and carrying on.

Q. Okay. What was you response to; well, did Mr. Hernandez request you to; make a request of you to provide the union representative at that time?

A. No ma'am.

Q. Did you indicate in any way to Mr. Hernandez whether or not he could have a union representative come in at that time?

A. He didn't; no, I didn't because he didn't ask for one, you know, he was saying he was going to do this. Then he was going to see the Warden. You know, it was unclear as to what he would do. You know, if he would have asked that he wanted a union rep, we have Mr. Dunn who is the local president who was there on the day watch. A female officer who was there at that time by the name of Miss Christmas. You know, there was people there if in fact that's what he chose to do, you know. You know there was people there that he could have consulted with.

Q. Now you stated that Mr. Hernandez refused at that point to write a memo until he saw either a union rep or the warden. What did you indicate to him would be your next move?

A. I told him that I was just going to write a memo stating what he said to the Captain, and that was between him and the Captain.

Q. Did you at any point indicate to him that you were going to write him up for disciplinary purposes?

A. No ma'am.

Q. Do you recall using the words, I will write you up?

A. I did not use them words. I told him that if he did not write a memo, the only thing, you know, the lieutenants, if they're told to do something, whatever the outcome is, are required to submit it back to the Captain. You know, the Captain, we return stuff to him in writing.

Q. So you would have written a memorandum to the Captain even if Mr. Hernandez had come up with a memo?

A. Yes. I would just put, enclosed is attached memo that you requested, whatever it would have been.

On cross-examination Lieutenant Rhoades also testified:

Q. Do you recall saying to Lieutenant, Officer Hernandez that he would have to sit down and write the memo first and then seek union representation?

> A. I didn't say that. You know, as I said earlier, he, at first he said he was going to talk to the union rep. Then he switched up and he was going to talk to the warden. You know, it was unclear to me what he was going to do. It was unclear to me whether or not he was going to write the memo, you know, he switched around. He, you know, first he was going to talk to the union rep, then he switched up, and then he was going to talk to the warden.
>
> The last thing he said something to; you know, while I was in the room, was something to the effect that he was going to see the warden. He'd discuss the problem with him. I said, that's fine, Mr. Hernandez, you know.

Officer Hernandez prepared a memorandum stating that he, "respectfully refuse[d] to write any more [memo's] concerning this incident till I speak with Warden Lansing." In fact Hernandez did speak with Warden Lansing about the incident.

Lt. Rhoades forwarded his memorandum to Captain Humme dated October 31, 1985 stating:

> Mr. Hernandez stated to this writer, no disrespect but, I am not [writing] a memorandum. I have [written] all the memorandum's that I am going to write. He stated that he was not going to [strengthen] their case against him and he wanted to see the union representative first. I then, explained to him that I would have to write a memorandum. Mr. Hernandez stated [he would] write a memorandum stating that [he was] going to see the Warden and [he would] explain the problem to him.

On November 12, 1985, Captain Humme recommended personnel action against Officer Hernandez for (1) providing false statements and (2) refusing to obey instructions of a superior official in that Hernandez "refused to obey [Humme's] instructions as given to you by Lt. Rhoades. Your action in this matter constitutes a violation of Federal

Prison System policy in that all employees are required to cooperate fully when questioned during investigations."

On January 6, 1986, Officer Hernandez was suspended for 14 days by Warden Lansing.

Conclusions

Although this case presents possible N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1975) questions, it is chiefly resolved on the basis of credibility determinations. Under Weingarten, supra, once a valid request for union representation has been made, the burden shifts to the Respondent to (1) grant the request (2) discontinue the interview or, (3) offer the employee the choice of meeting without a representative or no meeting at all.

The General Counsel submits the October 31, 1985 meeting constituted an examination in connection with an investigation under section 7114(a)(2)(B) of the Statute; that Officer Hernandez had a reasonable belief that discipline would result from a written request to Captain Humme; that Hernandez requested union representation; and, that Hernandez did not waive his right to representation. The facts clearly support a finding, and it is found, that an investigation was under way and that Hernandez reasonably believed that the investigation might lead to disciplinary action against him.

Respondent asserts that Hernandez was not denied union representation since he made no request for representation during the October 31, 1985 meeting.

Despite Respondent's assertion it is clear from the credited testimony that Hernandez mentioned a need for union representation during the meeting with Lt. Rhoades and his mention of the matter could be construed as a request for union representation. It is also clear that Lt. Rhoades disregarded what well may have been a request for union representation and insisted on a memorandum from Hernandez. The problem here is whether or not Hernandez' mention of a need for union representation constituted a valid request for such representation during the meeting. If that answer is affirmative then an additional question of whether he withdrew that request must also be examined.

Lt. Rhoades credibly testified that during the course of this short, but heated converstaion it was unclear to him whether Hernandez wanted a union representative or wanted to talk with the warden, because Hernandez kept "switching up." Even looking at all of the testimony in a light most favorable to Hernandez it is not clear whether he in fact wanted union representation or whether his statement in that regard was merely a reaction to further investigation because of his already documented inconsistent statements to two management officials. Examining the testimony concerning the meeting, I find it difficult to disagree with Lt. Rhoades that what Hernandez really desired at the time was confusing. Since Hernandez was a union steward, albeit with little experience it would appear to the undersigned that if he desired union representation in this matter he should have been aware how he could obtain it. Hernandez moved rather quickly through the conversation where he thought outloud about union representation, denounced management and finally, decided to petition to see the warden with his problem. In fact, the memorandum he supplied to Lt. Rhoades made no mention of union representation. In all the confusion it is entirely possible that Rhoades felt Hernandez kept "switching up" or that Rhoades wanted to get a memorandum from Hernandez setting out his position. If indeed Hernandez had wanted to be represented at that stage it is my opinion that he had the opportunity, at that time, to say so in writing. Moreover, in crediting Rhoades, it is found that Hernandez could have stopped the meeting and consulted with a union representative before submitting any memorandum on that day. Consequently, the undersigned is unpersuaded that Hernandez' mention of union representation during the course of the meeting constituted a valid request for such union representation.

Assuming arguendo that Hernandez made a valid request for union representation he seemingly vacated that request in favor of seeing the warden with his problem. Supposedly Hernandez placed trust in the fairness of the warden, prompting his request for a meeting with Warden Lansing. Hernandez also testified that he was badgered into preparing the October 31, 1985 memorandum however, he was not told what its contents should be. Rhoades prepared a memorandum at the same time and his memorandum made mention of the fact that Hernandez had, among other things, speculated about union representation. Seemingly, if Hernandez desired to continue his pursuit for union representation he would have, as previously stated, said so in the memorandum. Absent such a statement in his memorandum it appears to the undersigned that Hernandez voluntarily abandoned or withdrew his request for union representation, if indeed there was one.

In all the circumstances, noting particularly that these two individuals had never met before; that Hernandez was himself a union steward; that the conversation was heated and, that it concluded with a memorandum which supposedly set out Hernandez' wishes at the time, it is my opinion that if there was a request for union representation, it was withdrawn by Hernandez' subsequent action. Accordingly, without passing upon whether Hernandez otherwise would have been entitled to union representation, it is concluded that Respondent did not fail to comply with section 7114(a)(2)(B) of the Statute since a request for representation is a prerequisite to any obligation under that section. See Army and Air Force Exchange Service, Rocky Mountain Area Exchange, Fort Carson, Colorado, 16 FLRA 794 (1984); Department of Justice, Bureau of Prisons, Federal Correctional Institution, 14 FLRA 334 (1984). Therefore, it is concluded that Respondent did not violate section 7116(a)(1) and (8) of the Statute.[3/]

Additionally the General Counsel alleged that Respondent violated section 7116(a)(1) of the Statute when Lt. Rhoades indicated to Hernandez that he would be "written up" if he did not provide a memorandum. Again the credited and uncontradicted testimony reveals that Rhoades indeed stated that he was going to write a memorandum about the meeting to Captain Humme. Rhoades credibly testified that he explained to Hernandez that he would have to write a memorandum to Captain Humme concerning the outcome of their conversation no matter what that outcome might be. Clearly Rhoades had been ordered to perform a task and the memorandum was the manner in which he showed that he had performed that task. Memoranda used in such a manner are apparently commonplace at the facility. Such circumstances do not in my view connote any threat which would interfere with the exercise of rights guaranteed under section 7114(a)(2)(B) of the Statute. Nor does it carry with it a meaning which would suggest disciplinary action. Accordingly, it is concluded that the statement allegedly attributed to Lt. Rhoades did

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[3/] Based on the above finding which involves the same set of facts it is unnecessary to resolve the additional issue raised by General Counsel as to whether Respondent violated section 7116(a)(1), (2) and (8) of the Statute by proposing to suspend and suspending Hernandez inter alia, because he refused to participate in the October 31, 1985 examination.

not interfere with any employee rights granted by the Statute.[4]

In light of the foregoing, it found that Respondent did not violate section 7116(a)(1), (2) and (8) of the Statute by failing to afford Officer Hernandez the opportunity to be represented by his exclusive representative during an investigatory interview. Nor did Respondent violate section 7116(a)(1) of the Statute by threatening to write up Officer Hernandez if he did not provide a memorandum. Accordingly, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in Case No. 2-CA-60082, be and, it hereby is dismissed, in its entirety.

Eli Nash Jr

ELI NASH, JR.
Administrative Law Judge

Dated: May 20, 1986
Washington, D.C.

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[4] In view of the above findings, I deem it unnecessary to pass on General Counsel's arguments in brief concerning the appropriate remedies in the event a violation was found herein.

[5-CA-50312]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR
FORCE BASE, OHIO

Respondent

and

Case No. 5-CA-50312

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on May 23, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., June 30, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

[5-CA-50312]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, AIR FORCE LOGISTICS COMMAND, WRIGHT- PATTERSON AIR FORCE BASE, OHIO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 214, AFL-CIO Charging Party	Case No. 5-CA-50312

. . . .

Gail D. Reinhart, Esquire
For the Respondent

Mr. Paul Palacio
For the Charging Party

Sandra J. LeBold, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region V, Federal Labor Relations Authority, Chicago, Illinois against the Department of the Air Force, Headquarters, Air Force Logistics Command (AFLC), Wright-Patterson Air Force Base, Ohio (Respondent), based on a charge filed by the American Federation of Government Employees, Council 214, AFL-CIO (Charging Party, Union or AFGE, Council 214). The complaint alleged, in substance, that Respondent violated sections

7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by implementing AFLC Regulation 91-1, "Quality of Life." The complaint alleged that the Regulation constituted changes in terms and conditions of employment of bargaining unit employees, without having given advance notice to the Union and without having afforded the Union an opportunity to bargain concerning the substance and/or impact and implementation of the Regulation. Respondent's answer admitted the implementation of the Regulation, but denied any violation of the Statute.

A hearing was held in Dayton, Ohio. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. On January 13, 1978, American Federation of Government Employees, AFL-CIO (hereinafter called AFGE), was certified as the collective bargaining representative for a consolidated unit of all Respondent's wage grade and general schedule employees, with certain exclusions not herein relevant. The unit includes about 75,000 employees located at 11 AFLC facilities and units in California, Georgia, Kansas, Michigan, Ohio, Oklahoma, Texas, and Utah.

2. At all times material herein AFGE, Council 214, has been an agent of AFGE with respect to bargaining with Respondent on behalf of the collective bargaining unit.

3. At all times material herein, Respondent and the Union have been parties to a Master Labor Agreement covering the employees of the collective bargaining unit. Article 33 of the Master Labor Agreement entitled "Negotiations During the Term of the Agreement," provides:

> SECTION 33.02: NEGOTIATIONS AT COMMAND LEVEL
>
> a. For higher authority issuances directed to Command and issuances initiated at Command level the following procedures will be followed:

(1) The Labor Relations Office will notify the designated Union official in Section 33.01[1] above of the intended changes in conditions of employment. A reasonable time period/date following the notification will be identified as the implementation date. The Council President or designee may request and be granted a meeting to discuss the change . . . .

b. For higher authority issuances directed to activities, such as OPM regulations, bulletins, letters, and Air Force Directives, the following procedures will be followed:

(1) If the Employer intends to implement the issuances at the Command level, it will notify the designated Union official of its intent to implement. If the Union wishes to negotiate on the implementation, it will follow the procedures in Section 32.02a(2) above.

(2) If the Union wishes to initiate negotiations on changes to 40 series regulation, it will submit written proposals to the Labor Relations Office not later than 30 calendar days from the date of the issuance or directive. If the Union wishes to respond to the Employer's proposal for Command-wide implementation on other issuances, it will submit its written proposals not later than 15 calendar days prior to the identified implementation date. Negotiations will normally begin within five workdays after receipt by the Labor Relations Office of the Union's timely response to Management's proposals; or normally within 20 workdays of the Union's timely demand to initiate bargaining.

(3) The parties may mutually agree to delegate responsibility for negotiations to subordinate activities and local Union officials.

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[1] Section 33.01 provides that the Union will designate an official to represent it in mid-term bargaining at the Command level.

> (4) Agreements reached under this Section will be promptly implemented by the Employer in the appropriate form such as regulation, letter, or operating instruction. Disputes over the application of the implementing directive will be subject to resolution under Articles 6 and 7 of this Master Labor Agreement . . . .
>
> SECTION 33.03: NEGOTIATIONS AT ACTIVITY LEVEL
>
> a. Activity-wide changes in local conditions of employment, not covered by this MLA nor as a result of Command-wide negotiations under Section 33.02 above, which are within the discretion of the subordinate activity commander, will be brought to the attention of local Union officials prior to implementation in accordance with law and regulations. The Union will be given a specified reasonable implementation date as determined by mission requirements and the urgency for implementation.

Article 25 of the agreement covers health and safety. Section 25.03 provides for a safety and health committee at each AFLC facility. One purpose of the committee is to make recommendations to the commander.

4. The past practice with respect to notice of changes initiated by AFLC has been for Val Buxton, Chief, Labor Employees Relations Division, AFLC or a member of his staff, to inform the Union in writing of the proposed change. The contract and past practice provide that the notice will be given to a designated Union official who has been Paul Palacio, Council President.

5. On April 30, 1985 Respondent published and implemented AFLC Regulation 91-1, "Quality of Life." The regulation is in the "Real Property Operation and Maintenance" series. It applies to all AFLC facilities. The regulation provided, in part, as follows:

> QUALITY OF LIFE
>
> This regulation provides guidance to implement the AFLC Quality of Life program. It states command policy on planning, programming, and executing facility projects and equipment

purchases to upgrade working conditions and Quality of Life to a standard expected of a professional military organization. AFLC/CC approval is required to change or supplement this publication.

1. OBJECTIVES:

a. Improve significantly the AFLC worker's Quality of Life.

b. Raise the standard of what is an acceptable work environment throughout the command. We must change the mind-set-it's "good enough" for the Government worker.

c. Enhance direct mission support through improved efficiency, safety, health, and productivity in the workplace.

2. SCOPE. The scope of the Quality of Life program focuses on the workplace. By this we mean everthing the worker sees or uses upon entering the front gate until leaving at the end of the work day . . . . Projects under the purview of the Quality of Life program include maintenance, repair, and renovation of building exteriors basewide and the interiors of mission support type facilities. In addition, projects for landscaping, signs, parking lots, break areas, base restaurants, and so forth, are included as are furnishings and equipment which improve employee morale and pride by working in professional surroundings . . . .

. . . .

4. GENERAL. Traditionally, Quality of Life type projects have not fared well at the various funding forums . . . . For this reason, the Quality of Life program was initiated to ensure priority funding for these long neglected requirements. Manning to support the Quality of Life program must be obtained from existing resources.

5. RESPONSIBILITIES:

a. HQ AFLC will:

(1) Review, validate, and prioritize the use of command fiscal and physical resources for Quality of Life projects.

(2) Form a Quality of Life Steering Group to provide senior level oversight on a periodic basis. The steering group is comprised of Assistant DCS/Director level personnel from throughout the staff . . . .

(3) Publish a periodic Quality of Life bulletin providing procedural guidance, innovative ideas, and other crossfeed items between HQ AFLC and field organizations . . . .

b. ALC/AGMC/2750 ABW Commanders will:

(1) Be responsible for meeting the objectives outlined in this regulation using their own resources where possible, and command sources of funds when specifically provided . . . .

(2) Form an Executive Steering Group and Working Panel to identify areas for improvement and implement solutions.

(a) The Quality of Life Executive Steering Group should be comprised of members of the Facilities Board and chaired by the center commander or vice commander (2750 ABW CC at WPAFB). It may meet as an adjunct to the Facilities Board or as a separate body as desired by the chairperson. The group approves long-range plans for out-year improvements to facilities and enhancement of working conditions. It will also provide guidance to the Quality of Life Working Panel to achieve short-term goals. The steering group will meet quarterly or more often as needed at the discretion of the chairperson.

(b) The Quality of Life Working Panel will be comprised of the Quality of Life project officers from the major units on the base. The working panel will achieve short-term goals, carry out actions, and perform studies as directed by the chairperson of the steering group. The working panel should be chaired by a senior level manager designated by the commander and should meet monthly.

(3) Develop a 35mm reference file depicting "before" and "after" scenes of Quality of Life projects . . . .

6. PROCEDURES:

a. In-House Work:

(1) Base Civil Engineer (LCE) Work Force. The BCE's Operations Branch can be a major contributor to your Quality of Life program. This in-house work force provides skilled workers capable of completing small to medium scale projects, particularly maintenance and repair of existing facilities. Projects affecting Quality of Life should a least be assigned priority III on the AF Form 332, BCE Work Request. This does not preclude assigning a higher priority if the work directly affects mission effectiveness or health and safety . . . .

(2) Self-Help Work. Experience at other commands has shown self-help to be a relatively fast and cost effective way to accomplish Quality of Life projects of appropriate size and complexity. This is an excellent way to initiate interest and involvement in the Quality of Life program. The key to an excellent self-help effort is the base U-fix-it store (BUFIS). Each ALC and 2750 ABW BCE organization will develop a base U-fix-it store at their installation and document procedures in a base supplement to AFR 85-1 . . . .

AFR 85-1, chapter 9, provides policy for self-help work and procedures for the establishment of the BUFIS . . . .

b. Facilities Projects by Contract. The Working Panel will identify Quality of Life facility requirements which are then validated by the Executive Steering Group and forwarded to the BCE for program development. These projects are then presented to the base Facilities Board for validation, approval, and integration into the base O&M priority list. Projects approved by the Facilities Board for MCP or future year O&M funding should be submitted to HQ AFLC/DE during the program call for projects. Normal project approval limits and design and construction management procedures apply. To identify projects as qualifying for Quality of Life priority funding, several actions must be taken by the base . . . .

. . . . . .

d. Standards. The following standards represent command policy on various interior and exterior treatments.

(1) Exterior Paint. Comply with the provisions of your architectural compatibility plan to the extent possible . . . .

(2) Sign Standards. AFP 88-40, Sign Standards, prescribes specific standards for exterior signs which "must be followed exactly as they are described" . . . .

(3) Interior Design. Interior finishes and furnishings are an important and integral part of AFLC's Quality of Life program. Again, an efficient, attractive, and professional atmosphere should be sought, favoring the earth tones. Attractive interiors are the result of early planning and budgeting, not an afterthought as extrior construction nears completion. Interior design decisions are best made by a professional.

Each base would benefit from having an interior designer on the BCE staff. This may be accomplished by coverting an existing resource.

(a) Carpet. Carpet selections should conform to guidance contained in AFM 88-15. Complementing this guidance, avoid bright, bold geometric paterns (especially those with predominant lines running parallel to long walls and corridors). Favor instead the more subdued tones with small corporate patterns for office areas. Color selections must consider maintainability. Select patterns which minimize the use of light colors as they soil quickly.

(b) Furnishings. Another area which can produce a big payoff in productivity due to improved working conditions is furnishings. Furnishings include such items as furniture, drapery or other window coverings, artwork, plants, wastebaskets and accessories. Numerious attractive and functional items are available through GSA sources. Systems furniture can, in some instances, relieve overcrowding by maximizing the use of available space. Guidance for programming, funding, acquisition and maintenance of systems furniture is provided in AFLC Systems Furniture Policy Letter, dated 30 April 1985.

(c) Interior Signs and Wall Hangings. AFP 88.40 provides guidance on interior signs. Pictures, plaques, and other types of wall hangings must contribute to a tasteful interior decor and professional image. Selection of pictures and frames should include consideration of details such as height, appropriate theme, compatibility and uniformity of frames. Use professional help when available to get it right the first time. Anything displayed on interior walls must be framed or placed on framed bulletin boards. The only exceptions are those items specifically designed for display without a frame such as unit plaques. Loose items such as notices, schedules, air raid directions, and fire escape routes will be framed or displayed on bulletin boards.

6. Although the Quality of Life regulations was issued on April 30, 1985, the program had started considerably before that. General Earl T. O'Loughlin sent out a bulletin with regard to the program in December 1984. AFLC facilities and units were made aware that the Quality of Life program was one of General O'Loughlin's five major objectives or priorities. This designation meant that local facilities would give the program special emphasis to see that his priorities are met.

7. Respondent provides broad executive level oversight and guidance for the Quality of Life program. The program is designed to upgrade working conditions by executing facility improvement projects and equipment purchases throughout AFLC facilities. The objective is to improve the AFLC workers Quality of Life, raise the standard of an acceptable work environment, and enhance direct mission support through improved efficiency, safety, health, and productivity in the workplace. The "workplace" means "everything the worker sees or uses upon entering the front gate until leaving at the end of the work day." Since employees will have nicer places to work, sick leave use and absenteeism are expected to go down. Respondent has always had projects to upgrade facilities and furnishings at the local level, but they received low priority in terms of funding compared to direct mission activities. There is no evidence of a prior AFLC regulation establishing guidance for the implementation of a uniform Quality of Life program throughout the Command. The focus of the Quality of Life program was to provide Command guidance for implementation of the program by AFLC facilities in order to meet the objectives of the program and increase the number of such projects by providing priority funding and publicity. Each AFLC facility received about 3 million dollars each for the program. The regulation provided guidance on program objectives and established the procedural framework for implementation of the program.

8. Each AFLC facility commander was required to implement the program within this framework. The local commander forms a working panel from the major units on the base to perform studies and identify requirements. The commander has discretion as to who will be on the panel.[2] He also forms

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[2] Paul Palacio, President of the Union, testified that bargaining unit employees could be members of the panel. He did not give any specific examples, and the regulation is silent on whether or not bargaining unit employees could be panel "project officers." See Finding No. 5.

an Executive Steering Group, apparently made up of senior staff, to provide guidance to the working panel. Apparently, in-house projects can be approved at the Executive Steering Group level.

9. The work for in-house projects is performed by the base civil engineering workforce or by self-help. Self-help is the method whereby the employees, including bargaining unit employees, carry out renovation or repair work. There is no evidence that the program changed existing self-help policy, including its voluntary nature, the hours when it is performed, or workers' compensation coverage.

10. For projects requiring outside work contracts, the Executive Steering Group would forward these to the Base Civil Engineer and Base Facilities Board for development and approval. Approved contract projects would then be submitted to Respondent for priority finding and publicity.

11. The only time Respondent would change a selected project is if it were illegal or exceeded other normal project approval limits.

12. The program made no changes concerning evaluations, quality centers, or productivity. Flex-time is not a part of the program.

13. On June 7, 1985, Paul Palacio, president, AFGE Council 214 requested a copy of the Quality of Life regulation from Respondent's Labor Relations Officer, Mr. Val Buxton. Mr. Buxton provided a copy on June 11, 1985.

14. Prior to receiving a copy of the regulation in June 1985, AFGE, Council 214 had not received notice of the implementation of the Quality of Life program from Respondent. However, during February of 1985, the Union's designated representative received notice of the Wright-Patterson Air Force Base's local initiatives with regard to the program. During February 1985 Mr. Don Cook replaced Paul Palacio as the Union representative on 100 percent official time at AFLC Headquarters. Cook was also president of Local 1138. A regular monthly meeting was held on February 14, 1985 between the Wright-Patterson Air Force Base Commander and Local 1138. During this meeting the Base Commander, Colonel Fox, brought up the subject of Quality of Life initiatives he had under consideration for Wright-Patterson Air Force Base. When he brought up the subject, Mr. Cook stated that he and Betty Carol of the Local had to leave and would have to wait on the Quality of Life briefing until the next meeting.

Robins Air Force Base, Georgia

15. On May 22, 1985 Colonel Peter L. Brune, Director of plans and programs, Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, Georgia sent a memorandum concerning Quality of Life to all staff offices. The memorandum provided, in part, as follows:

> The Quality of Life in the Workplace Program was initiated by the AFLC Commander as one of his top five priorities . . . . We have realized some good results from this program already; however, much remains to be done. We must all take a personal enthusiastic interest in the program and motivate broad participation. Your Quality of Life Committee members and/or project officers must insure initiatives for interior and exterior improvements are quickly initiated and thoroughly documented.
>
> . . . .
>
> Since February 1985, we have done some good planning and your people should be commended for accomplishments so far. Now, however, we need to redouble the efforts. Self-help projects, spring clean up and fix up, painting, and highly visible improvements need our attention now.
>
> Your assistant in generating enthusiasm for the program and in following AFLCR 93-X [the draft regulation] is necessary to the Quality of Life program and to satisfy findings of future MRIs [inspections] which will focus on program documentation and actions completed this summer.

16. In approximately July 1985, Shirley York, Union steward at Robins Air Force Base, discovered Quality of Life suggestion forms in the break area where she works. She took a copy of the form to the Union president at Warner Robins who is designated to receive notice of base-wide changes. The Union

president informed York that she had never seen the form nor been notified about the Quality of Life program. The form provided space for employees to make suggestions and present ideas about improving the quality of life. The form called for employees to fill out the form including name, telephone, and organization and return it to their appropriate division monitors. The names and telephone numbers of five division monitors within the maintenance organization were listed at the bottom of the form. There are approximately 7,000 bargaining unit employees in the Maintenance Organization. Ms. York telephoned the division monitor in her work area, Eddie Carter. Mr. Carter explained that the project's purpose was to enhance the work life of the worker. The forms were for employees to write about gripes, problems, and solutions. According to Carter, some of the concerns expressed by employees included the need for repair of volleyball courts, the need for awnings over doorways to protect employees from the rain, the need for correction of safety hazards such as cracks and holes in sidewalks, the need for an air conditioner in the ladies restroom, the need for more space and better lighting in the training building, and the need for correction of parking lot problems. York also learned that one of the local structured committees at Robins sold Quality of Life raffle tickets for a shotgun prize and a $150.00 shopping spree.

17. The Labor Relations Office at Robins Air Force Base has established a procedure whereby the office is informed of all in-house or contracted-out construction projects in order to notify and bargain with the Union any changes in the workplace. One Quality of Life project involving the relocation of employees to a temporary structure to relieve overcrowding has been negotiated with the Union. No other Quality of Life projects have been negotiated. The Labor Relations Officer, John Adkins, testified that he had not identified any other projects with an adverse impact. He had concluded that there were no implementing procedures to negotiate concerning the project of installing an awning over a door to protect employees from the rain, and that the project did not involve an adverse impact to be reduced by bargaining. Also, frames have been required for wall hangings at Robins since 1968.

Hill Air Force Base, Ogden, Utah

18. Prior to the Quality of Life program, Hill Air Force Base had improvement-of-workplace projects in place. These included self-help projects to "paint-up, spruce-up, clean-up," under what was known as the Spruce Log program, as well as a contract programs to perform such improvements as the renovation

of office space. When the Quality of Life program came into existence by Respondent, Hill Air Force Base reclassified one third of its pre-existing projects as Quality of Life projects. The base Spruce Log program was merged into the Quality of Life program. Subsequently, other projects were identified under the Quality of Life program, such as the air conditioning of offices and the installation of new lighting, ceilings, and carpeting. The increased emphasis on workplace projects provided by the Quality of Life program enabled Hill Air Force Base to bring such projects to the forefront and ensure that monies would be available for them. According to Michael Jusko, chief contractor and base engineering officer at Hill Air Force Base, the "current emphasis is allowing us to do far more than we ever envisioned we would be able to do."

19. Under the Hill Air Force Base Spruce Log self-help program, the Union had a representative on both the steering committee and the working group. The Union at Hill Air Force Base received no notice of the Quality of Life program, and there is no evidence that the Union is represented on any committee. Self-help projects have continued under the Quality of Life program with bargaining unit employees being voluntarily involved in the projects during work hours or non-work hours.

20. It has been the policy at Hill Air Force Base for three to four years that all wall posters must be placed in frames.

Newark Air Station, Newark, Ohio

21. During the period January to May and continuing to the date of the hearing, 1985, officials at the AFLC facility at Newark Air Station, Newark, Ohio discussed the Respondent's Quality of Life program with local Union officials. In January 1985 a meeting was held to obtain the Local's views on an employee survey in the Maintenance Division. The Local had no objection as long as it was on a voluntary basis. In February 1985 a meeting was held to obtain the Local's comments on projects which the steering committee planned to implement. Again in May 1985 the Local's views of an employee survey in a different Division was solicited. The Local has voiced no objections to the Quality of Life program.

Discussion, Conclusions, and Recommendations

The General Counsel contends that the Quality of Life regulation implements a major new program to upgrade working conditions by calling for improvements in building exteriors and interiors in order to improve employee morale, pride, safety, and productivity. The General Counsel points out that the program is funded at eight facilities at approximately three million dollars per facility, and embodies one of the five top goals of the AFLC Commander. The General Counsel asserts that the Union was entitled to notice and the opportunity to bargain on the substance and impact and implementation of the regulation. The General Counsel refers to such matters as the committee structures, potential conflict with the safety and health committees established by the mostly labor agreement, and the use of a self-help work force. The General Counsel points to changes as a result of the program in the area of self-help, employee surveys, Union representation on committees, and in physical space.

Respondent defends on the basis that the regulation did not change conditions of employment; any change is de minimis; any bargainable impact would occur at the local level and be properly bargained over at the local level pursuant to the master labor agreement; and the Agency gave the Union proper advance notice when the local Wright-Patterson base commander tried to speak with the Union's designated representative.

It is well established that an agency may not unilaterally change established conditions of employment of unit employees where the change is within the duty to bargain without first notifying the exclusive representative of the change and affording it an opportunity to bargain concerning the decision to effectuate the change. See Department of the Treasury, Internal Revenue Service, Atlanta Service Center, 18 FLRA No. 83, 18 FLRA 731 (1985).

The record does not establish that the regulation explicitly changed existing conditions of employment in terms of the self-help program, the types of materials to be used, the framing of wall posters, nor does it expressly involve bargaining unit members in the committees specified in the regulation. However, a preponderance of the evidence establishes that the regulation does constitute a bargainable change. Although there have always been projects to upgrade facilities and furnishings at the base level, traditionally such projects have received a low priority and poor funding. There is no evidence of a prior AFLC regulation establishing, as the instant one does, a Command-wide policy for upgrading working conditions by initiating facility improvement projects and equipment purchases. The regulation establishes uniform objectives, standards, and planning, programming, and executing procedures. By means of the regulation, local AFLC commanders were directed by Respondent to implement the various procedures established by the regulation and were to be "responsible for meeting the objectives outlined . . . ." These objectives were to "improve significantly the AFLC workers' Quality of Life, raise the standard of what is an acceptable work environment throughout the command, and enhance direct mission support through improved efficiency, safety, health and productivity in the workplace." The "workplace" is broadly defined as "everything the worker sees or uses upon entering the front gate until leaving at the end of the work day." Respondent provides broad executive level oversight and guidance for the program and advised local commanders that Quality of Life was one of the top priorities of the AFLC commander. The program was funded at approximately 3 million dollars per facility. Based on these factors, I conclude that the issuance of the regulation represented a change by the creation of a new nationwide policy at the Command level concerning issues which the parties had not previously negotiated on a nationwide basis. Department of the Treasury, U.S. Customs Service, 19 FLRA No. 128, 19 FLRA 1155 (1985).

The regulation, designed to upgrade working conditions by executing facility improvement projects and equipment purchases, clearly involved "conditions of employment," i.e., personnel policies, practices, and matters affecting working conditions. Section 7103(a)(14). In construing that statutory phrase, the Authority had found proposals which concern matters directly affecting "the work situation and employment relationship" of bargaining unit employees to be within the duty to bargain. National Association of Government Employees, Local R5-168, 19 FLRA No. 75, 19 FLRA 552 (1985). See also American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 606 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). Respondent makes no contention or showing that negotiation on the substance of the regulation is barred by the management rights provision of the Statute set out in Section 7106(a) or would be negotiable only at the election of the Agency under section 7106(b)(1) of the Statute as involved "the technology, methods, and means of performing work[.]"

The regulation has precipitated changes in the make-up of local committees (the Union is no longer represented on the committees at Hill Air Force Base), resulted in employee surveys or questionnaires at Robins Air Force Base and Newark Air Station, presumably under the authorization of the working panels "to perform studies," and has resulted in numerous construction and self-help projects at Hill Air Force Base ("more than we ever envisioned"), project planning at Newark Air Station, and a major relocation of employees to relieve overcrowding at Robins Air Force Base.

The Authority has held that proposals as to office space design, equipment, and furniture which do not constitute part of the technical method used by the Agency for furthering or accomplishing its work would be within the duty to bargain if such proposals otherwise are consistent with law and regulation. See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C., 7 FLRA 578 (1982), enforced sub. nom. Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir., 1983); Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois, 16 FLRA 141 (1984).

The Union was also entitled to bargain on the procedures which management officials will observe in implementing the program and appropriate arrangements for employees adversely affected. For example, a major objective of the program is to improve health and safety in the workplace. As such, there is potential for overlap between the jurisdiction of the Quality of Life program and its committees and that of the Safety Health Committees provided by the collective bargaining agreement which could be resolved by negotiations. The record also reflects that while the Union was previously involved in the work of committees under the local program at Hill Air Force Base, it is no longer involved under the Quality of Life program which absorbed the previous program. The Authority has held that proposals which would require joint labor-management efforts for purposes which would not involve the exclusive representative in management's deliberations and discussions as part of the decision-making on matters covered by section 7106(a) are within the duty to bargain. National Treasury Employees Union, 2 FLRA 255, 262-263 (1979). The record also reflects that surveys and questionnaires of employees have been precipitated by the Quality of Life Program and that, in one instance, Respondent consulted with local Union officials concerning such surveys. See Department of Defense, Office of Dependents Schools, 19 FLRA No. 94, 19 FLRA 762, 763-764 (1985) (criteria for determining when questionnaires of employees would require bargaining with the exclusive representative or constitute an unlawful bypass).

Since the substance of the regulation was itself negotiable, the question is whether the statutory obligation to notify and negotiate with the exclusive representative was fulfilled, not the extent of impact of any unilateral change in conditions of employment upon the unit employees. Department of Health and Human Services, Social Security Administration, 19 FLRA No. 123, 19 FLRA 1085 (1985).[2]

Though the parties' agreement did provide for local negotiations if a change were made by an activity in local conditions of employment, here the change was initiated at the Command level and applied Command-wide. The regulation directed each local commander to comply with the regulation and Respondent provided executive level oversight and guidance. As noted, the regulation created a new nationwide policy concerning issues which the parties had previously negotiated on a nationwide basis. There is no evidence that, as provided by the collective bargaining agreement, the parties mutually agreed to delegate responsibility for negotiations to subordinate activities and local union officials. Thus, Respondent was required to give appropriate and timely notice to the Union at the level of exclusive recognition before issuing and implementing the regulation. Department of the Treasury, U.S. Customs Service, supra, 19 FLRA at 1159; Department of Health and Human Services, Social Security Administration, 18 FLRA No. 13, 18 FLRA 73, 81-83 (1985); United States Department of Defense, Army and Air Force Exchange Service, Dallas, Texas, 19 FLRA No. 83, 19 FLRA 652 (1985).

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[2] In the event it were deemed necessary to determine this issue, I would find, using the factors set out by the Authority in Department of Health and Human Services, Social Security Administration, Chicago Region, 19 FLRA No. 101 (1985), and all the circumstances of the case, that the impact or reasonably foreseeable impact of the exercise of a management right (not identified by Respondent) is more than de minimis. As noted, the program intends to significantly improve employees' efficiency, safety, health, and productivity by raising the standard of an acceptable work environment throughout the Command through a wide-ranging variety of facility projects and equipment purchases. The change is permanent and can only be changed by the AFLC commander. All 75,000 bargaining unit employees at 11 facilities throughout the country are foreseeably effected. This is the stated intent of the regulation. The Union represents 75,000 employees. The regulation is a Command-wide policy issued at the Command level. It has been the practice in the past to negotiate AFLC regulations that have impacted on employees' working conditions at the level of exclusive recognition. The procedural and policy aspects of the program were implemented immediately. However, since individual facility projects and equipment purchases will be accomplished under the guidance of the program regulation at the local level, there will necessarily be some time lag between implementation of individual projects at that level and any involvement or adverse affect on unit employees in this regard.

Respondent's position that it gave the Union advance notice is without merit. Although Don Cook, Local 1138 president, was acting as the Union representative at AFLC headquarters, the record reflects that the briefing by the local base commander which Cook aborted in February 1985 concerned local base initiatives under the Quality of Life program. The record does not reflect that the base commander was authorized, prepared, or competent to advise Cook of the terms of the Command-wide regulation to be issued by Respondent on April 30, 1985. This fact attains significance when viewed against the past practice with respect to notice of changes initiated by Respondent at the Command level. It was the past practice for Respondent's Chief, Labor Relations Division, or a member of his staff to inform the Union in writing of the proposed change. There is no evidence that authorization to give notice of a Command-wide change was ever delegated to a local base commander.

It is concluded that Respondent's action on or about April 30, 1985 in publishing and implementing AFLC Regulation 91-1, "Quality of Life," which regulation constituted changes in terms and conditions of employment of bargaining unit employees, without having given advance notice to the Union and without having afforded the Union an opportunity to bargain concerning the substance and impact and implementation of the Regulation violated section 7116(a)(1) and (5) of the Statute, as alleged.

The General Counsel requests, in part, that the regulation be rescinded. In view of the laudatory nature of the regulation and the number of projects in progress to improve working conditions, I do not find that rescission would be consistent with an effective and efficient Government or necessary to carry out the purposes of the Statute. Rather, it will be recommended that the parties bargain concerning the substance, implementation, and any adverse impact of the regulation, and revise such regulation and take other actions consistent with any agreement reached.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order to effectuate the policies of the Statute:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the

Statute, the Authority hereby orders that the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, shall:

1. Cease and desist from:

(a) Failing and refusing to give the American Federation of Government Employees, Council 214, AFL-CIO, appropriate and timely notice and the opportunity to bargain to the extent consonant with law and regulations before issuing and implementing AFLC Regulations which change established conditions of employment.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request of the American Federation of Government Employees, Council 214, AFL-CIO, negotiate to the extent consonant with law and regulations concerning the substance of AFLC Regulation 91-1 of 30 April 1985, the procedures to be observed in implementing the Regulation, and appropriate arrangements for employees who have been, or may be, adversely affected by the implementation of the Regulation, and revise such Regulation and take other actions consistent with any agreement reached.

(b) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander, Air Force Logistics Command, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. Section 2423.30 notify the Regional Director, Federal Labor Relations Authority, Chicago, Illinois, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: May 23, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to give the American Federation of Government Employees, Council 214, AFL-CIO, appropriate and timely notice and the opportunity to bargain to the extent consonant with law and regulations before issuing and implementing AFLC Regulations which change established conditions of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, Council 214, AFL-CIO, negotiate to the extent consonant with law and regulations concerning the substance of AFLC Regulation 91-1 of 30 April 1985, the procedures to be observed in implementing the Regulation, and appropriate arrangements for employees who have been, or may be, adversely affected by the implementation of the Regulation, and we will revise such Regulation and take other actions consistent with any agreement reached.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 5, whose address is: 175 W. Jackson Blvd., Suite A-1359, Chicago, IL 60604 and whose telephone number is: (312) 353-6306 or FTS 8-886-3468.

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Washington, D.C. 20424

NUMBER 62

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

August 29, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 7-CA-50629 (July 17, 1986)

National Bureau of Standards, Gaithersburg, Maryland and National Bureau of Standards, Boulder Laboratories, Boulder, Colorado and American Federation of Government Employees, Local 2186, AFL-CIO

Case No. 5-CA-60065 (July 24, 1986)

Army and Air Force Exchange Service, Ohio Valley Exchange Region, Charlestown, Indiana and American Federation of Government Employees, Local 2302, AFL-CIO

Case No. 2-CA-50349 (July 24, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, Council 220

Case No. 1-CA-50145 (July 29, 1986)

Department of Defense Dependents Schools, Mediterranean Region (Madrid, Spain); and Zaragoza Elementary School (Zaragoza, Spain) and Zaragoza Federation of Teachers, Local 1550, AFT

Case No. 1-CA-50238 (July 29, 1986)

Department of Defense Dependents Schools, Mediterranean Region (Madrid, Spain); and Rota Elementary School (Rota, Spain) and Rota Federation of Teachers a/w Overseas Federation of Teachers, AFT, AFL-CIO

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

3.F31/21-3:

Case No. 7-CA-50627 (August 11, 1986)

Department of the Air Force, Odgen Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, Local 1592, AFL-CIO

Case No. 7-CA-50446 (August 22, 1986)

Department of the Air Force, Odgen Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, Local 1592, AFL-CIO

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL BUREAU OF STANDARDS,
GAITHERSBURG, MARYLAND

and

NATIONAL BUREAU OF STANDARDS,
BOULDER LABORATORIES, BOULDER,
COLORADO

Respondents

Case No. 7-CA-50629

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2186, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on May 28, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

READEX FICHE Best copy available

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., July 17, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[7-CA-50629]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NATIONAL BUREAU OF STANDARDS,
GAITHERSBURG, MARYLAND

and

NATIONAL BUREAU OF STANDARDS,
BOULDER LABORATORIES,
BOULDER, COLORADO

Respondents

Case No. 7-CA-50629

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2186, AFL-CIO

Charging Party

Neil D. Friedman, Esquire
For the Respondents

Matthew Jarvinen, Esquire
Nicholas J. LoBurgio, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101. *et. seq.*1/, and

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, *e.g.*, Section 7116(a)(1) will be referred to, simply, as "§ 16(a)(1)."

the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondents by various acts and asserted statements in connection with the processing of a grievance of a reprimand, which Respondents had believed had resolved a proposed suspension of five days, interfered with the right of the employee freely to use the negotiated grievance procedure without fear of penalty, retaliation, interference or coercion in violation of §§ 16(a)(1) of the Statute.

This case was initiated by a charge filed on September 26, 1985 (G.C. Exh. 1(a)) which alleged violations of §§ 16(a)(1), (4) and (b)(3); and a First Amended Charge filed on November 19, 1985 (G.C. Exh. 1(b) which alleged violation of § 16(a)(1) only. The Complaint and Notice of Hearing issued on December 12, 1985 (G.C. Exh. 1(c)) and set the hearing for January 16, 1986; and by Order dated December 31, 1985, the hearing was rescheduled for February 20, 1986, pursuant to which a hearing was duly held on February 20, 1986, in Denver, Colorado, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues presented, to examine and cross-examine witnesses, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, March 20, 1986, was fixed as the date for mailing post-hearing briefs and each party timely mailed an excellent brief, received on, or before March 25, 1986, which have been carefully considered. Upon the basis of the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

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[2] By letter dated March 18, 1986, the reporter, Holman E. Mills, advised that his attention had been called to the omission of a question and answer at pages 65 and 66 of the transcript, which omission was obvious from reading the transcript; and, accordingly, he had retyped pages 65 through 70 which he enclosed and which I have inserted in the original of the transcript. In retyping pages 65-70, the Reporter corrected some errors. General Counsel filed a motion to correct the transcript, to which no opposition was filed, and said motion is granted except as noted hereinafter. The changes requested on pages: 67, 70, lines 9 and 17; and the spelling of my name on pp. 70 are denied for the reason that the reporter has already made these corrections in retyping pages 65-70. The change requested on p. 70, line 14, is granted but on the retyped page the line number is 22. The changes requested on page 87, line 20 and page 88, line 5 are denied as the transcript appears correct. All other requests for correction are granted as more fully set forth in the Appendix.

Findings

1. At all times material, American Federation of Government Employees, Local 2186 (hereinafter referred to as the "Union") has been the exclusive representative of a bargaining unit consisting of all non-supervisory employees in the Plant Division and Instrument Shops Division at Respondent Boulder Laboratories facility (G.C. Exhs. 1(c), par. 4, 1(d), par. 1-6).

2. Michael T. Brines is a Utilities Systems Repair Operator in the Plant Division. By way of background, Mr. Brines had an affair with Dixie Knowles Woodhouse an employee of the Boulder Laboratories' mail room contractor, Raven; lived with her for a time until Ms. Woodhouse terminated the relationship; and resumed a close relationship until Ms. Woodhouse "dumped" him again. Mr. Brines represented that, "my world was shattered. I didn't care if I lived or died. All that summer, I went to a therapist, did everything I could to stop the hurt . . . I continued to call her at home, sent her flowers and notes . . . ." (G.C. Exh. 3).

3. On June 14, 1985, Mr. William Scott, Foreman, Mechanical Unit, Plant Division and Mr. Brines' immediate supervisor (Tr. 9), issued to Mr. Brines a Proposed Suspension and Proposed Order to Avoid Contact While on Duty (G.C. Exh. 2). The proposed suspension of five days without pay was for "harrassing Ms. Dixie Woodhouse" at work during the period April 19, 30, May 1 and 2, 1985. Mr. Scott additionally proposed to order Mr. Brines to "avoid all contact with Ms. Woodhouse on site and during official business hours." (G.C. Exh. 2). Mr. Scott noted, in part, that Mr. Brines had been counseled on September 17, 1984, _inter alia_, for ". . . alleged disturbance of Raven [the mail room contractor] mail room personnel." (G.C. Exh. 2). Mr. Scott's notice of June 14, concluded with the statement,

> "3. You may reply orally, in writing, or both to Mr. Guy W. Chamberlin, Jr., Director, Office of Administration, National Bureau of Standards . . . Gaithersburg, Maryland, telephone 921-2477. If you wish to talk to Mr. Chamberlin you must do so via FTS . . . you will be allowed seven (7) calendar days from the date of this letter to submit your answer . . . ." (G.C. Exh. 2).

4. The Union filed a grievance with respect to the proposed suspension which was denied because, ". . . we couldn't grieve a proposal." (Tr. 28). Mr. Donald Wilson, the Union's Chairman of the Chief Stewards, suggested that Mr. Brines write Mr. Chamberlin; Mr. Brines drafted a letter; and Mr. Wilson's wife, the Union secretary, typed it. Mr. Brines' letter to Mr. Chamberlin was dated June 20, 1985 (G.C. Exh. 3).

5. The National Bureau of Standards' peculiar policy, which counsel for Respondents said he would, ". . . stipulate that it is stupid procedure" (Tr. 71), that ". . . any disciplinary action beyond a reprimand be decided by the major operating unit director" (Tr. 71), in this case by the Director of Administration (Tr. 40, 71), has no apparent "saving grace." First, it creates two proceedings instead of one - initially to the Director, here to the Director of Administration, Mr. Chamberlin, and, while not exactly a grievance, a right to written or oral, or both, reply with a decision by the Director. Second, a right to grieve the discipline imposed by the Director; however, the normal steps of the grievance procedure are, in effect, nullified for the reason that the officials, at least at the first three steps, would all be directly subordinate to the Director and ". . . in no position to make an unbiased decision on the grievance." (Tr. 43-44). Third, to supply needed information, which normally is provided through the grievance steps where the supervisor imposes discipline and his action is grieved, the Director through Headquarters personnel must conduct his own investigation. In this case, the Personnel Officer of the National Bureau of Standards, Ms. Elizabeth W. Stroud, made a trip to Boulder for this purpose (Tr. 72-73).

6. Following Ms. Stroud's visit to Boulder, Mr. Chamberlin, by letter dated August 16, 1985, advised Mr. Brines, in part, as follows:

> "I fully considered your personal written response . . ., the written response prepared on your behalf by your representative, Donald E. Wilson, the personal nature of the circumstances surrounding your case, your acceptance of treatment for your problems, the improvement made in your behavior, and I thoroughly reviewed the specific incidents described in the proposed letter and the material used to support the harassment charges, in arriving at my decision to reduce your five day suspension to an official reprimand.

> "Accordingly, this letter will serve as an official reprimand for your harassment of Ms. Dixie Woodhouse and will be placed in your Official Personnel File for a period not to exceed one year . . . If further instances of harassment should occur, they may result in your removal from the Federal Service.
>
> "You have the right, if you so choose, to grieve this reprimand. The grievance procedures are outlined in Article XX of the Negotiated Agreement . . . An extra copy of this letter is enclosed should you elect to provide one for your union Steward in pursuing a grievance." (G.C. Exh. 4).

7. Instead of mailing the letter dated August 16, 1985, to Mr. Brines, Ms. Stroud again went to Boulder to personally deliver the letter to Mr. Brines which she did on August 19, 1985. Accordingly, on August 19, 1985, Mr. Brines was called to a meeting with Mr. Scott, his immediate supervisor, Ms. Stroud, and Mr. Donald Fulsos, President of the Union, and Ms. Stroud handed Mr. Brines the letter and said that, ". . . she and Mr. Chamberlin felt I was getting off easy." (Tr. 13). Mr. Brines testified that,

> "I told her that I was really pleased with the fact that I didn't get a five day suspension, because I was getting married that Sunday and I couldn't afford it after spending $1,700 dollars on a wedding, but I told her eventually during the discussion, that I was not pleased with the fact that I had never been able to tell my side of the story, never once.
>
> "Q Can you tell us whether a grievance was discussed during that meeting?
>
> "A She asked me about it and she asked me about how I felt, like I was going to file a grievance, and I told her at that time, no, and I told her it was an unfair question." (Tr. 13-14).

Mr. Brines' testimony was wholly uncontradicted, as no other person present at the meeting testified, and his testimony is, therefore, fully credited. Despite nuances to the contrary, it is understandable that Ms. Stroud reported to Mr. James Spencer, Labor Relations Officer at the Support Center, that, "she felt he [Brines] was very humble and was very pleased with the decision that was rendered by Mr. Chamberlin . . . ." (Tr. 43). Although I do not question that Ms. Stroud told Mr. Spencer that, ". . . this really ended the issue" (Tr. 42), I do not find, as she represented to Mr. Spencer, that Mr. Brines said to her that ". . . there would be no reason for top management officials to even hear his name again." (Tr. 42), for the reason that Mr. Brines, the only person present at the meeting who testified, did not confirm any such statement and when confronted with the assertion by Mr. Harold James Reese, Chief, Labor Relations and Staff Services, National Bureau of Standards, responded,

> "I told him that I has told Mrs. Stroud when she was here, that I was not pleased with the fact that nobody had ever listened to my side of the story . . . ." (Tr. 19-20)

8. Mr. Spencer testified that within a week after August 19, i.e., on or before August 26, 1985, Mr. Wilson told him that he thought Brines, ". . . would be filing a grievance over the reprimand" (Tr. 43) and they discussed how such a grievance would be handled because, ". . . here was a situation in which a high level management official had made the decision and issued the reprimand and it really made no sense for a grievance to be filed under the provisions of our negotiated grievance procedure, because the official at the first three steps of that grievance procedure were all directly subordinate to Mr. Chamberlin, and obviously would not be in a position to make an unbiased decision on a grievance." (Tr. 43-44). Mr. Spencer said he "speculated at the time" that the only logical approach, in his opinion, would be to file the grievance at the step four level with the Director of the Boulder Laboratories, Mr. Robert A. Kamper, who, while not subordinate to Mr. Chamberlin, was nevertheless junior in rank to Mr. Chamberlin[3] (Tr. 44; Res.

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[3] Mr. Reese testified that he had a problem with submission of the grievance to Mr. Kamper because, ". . . in the managerial rank, Bob Kamper is not at the same level as Mr. Chamberlin is, that Mr. Chamberlin does outrank him in the managerial scheme" (Tr. 83-84) and that he, Reese, thought the grievance should be filed with the Deputy Director, Mr. Ray Cameron (Tr. 84). Mr. Reese's disquietude proved well founded (Tr. 84, Res. Exh. 2).

Exh. 1 and 2). Mr. Wilson seemed to agree (Tr. 44). The record does not directly show whether this conversation was reported by Mr. Spencer to Headquarters; but in view of Mr. Reese's testimony concerning discussion of its handling, I draw the inference that it necessarily was reported, inasmuch as Mr. Spencer told Mr. Wilson when the grievance was filed that he would forward the grievance to Dr. Kamper (Tr. 45).

9. On September 4, 1985, Mr. Wilson brought Mr. Brines' grievance to Mr. Spencer (Tr. 44; G.C. Exh. 5), at which time Mr. Spencer told Mr. Wilson he would forward the grievance to Dr. Kamper (Tr. 45) which he did by memorandum dated September 5, 1985 (Res. Exh. 1). Mr. Spencer forwarded copies of the grievance and his transmittal memorandum to Dr. Kamper on September 5 to Mr. Chamberlin and to Ms. Stroud by express mail (Tr. 47).

10. On September 6, 1985, Mr. Reese called Mr. Spencer and told him that Mr. Chamberlin and Ms. Stroud were surprised, confused and puzzled by the grievance because they had understood that Brines was extremely satisfied with Mr. Chamberlin's disposition of his proposed suspension (Tr. 48). Mr. Reese told Mr. Spencer he wanted to know whether the grievance was really initiated by Brines or whether it had been encouraged by the Union (Tr. 48) and asked Mr. Spencer if it would be feasible for him, Reese, to set up a telephone call to Brines (Tr. 48-49). Mr. Spencer suggested, as an alternative, that he, Spencer, at least talk to Union President Fulsos, to which suggestion Mr. Reese agreed (Tr. 49). Mr. Spencer called Mr. Fulsos and asked if he could come over to see him and he said fine, and Mr. Spencer then went to Mr. Fulsos' work site and talked to him. Mr. Fulsos told Mr. Spencer that Brines was upset because he learned that the decision of Mr. Chamberlin had been divulged to Ms. Woodhouse and he assumed that was the reason for his grievance (Tr. 50). I do not credit Mr. Spencer's testimony that he discussed any further meeting with Mr. Fulsos. Mr. Fulsos did not testify and from Mr. Reese's testimony it seems clear that Mr. Spencer believed the inquiry was closed upon ascertainment that Mr. Brines had, indeed, been the one who had decided to file the grievance and no meeting was arranged until Mr. Reese asked Mr. Spencer to do so.

11. Mr. Reese testified[4] that Mr. Spencer called him back and ". . . assured me that it was a grievance Mr. Brines

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[4] My factual findings regarding conversations between Spencer and Reese is a composite of the credited testimony of each, based upon the plausibility and evaluation of their

(continued)

filed on his own behalf." (Tr. 75). Mr. Reese stated that he so informed Mr. Chamberlin and Ms. Stroud (Tr. 76); but that Mr. Chamberlin directed him to ". . . call Boulder and to verify that Mrs. Stroud's understanding was correct [i.e. that when Ms. Stroud delivered the decision on August 16, ". . . Mr. Brines was satisfied and that Mr. Fulsos, his representative was satisfied, and pleased with the decision"] (Tr. 76-77). Accordingly, Mr. Reese called Mr. Spencer and asked him to set up a meeting by telephone conference with Mr. Brines and his representatives (Tr. 77).

12. Mr. Spencer on September 9 called Messrs. Fulsos, Wilson and Brines to come to his office (Tr. 16, 30). When all were assembled, Mr. Brines testified that Mr. Spencer,

> ". . . said that Guy Chamberlin, the Chief of the National Bureau of Standards was very unhappy that I had filed a grievance over my letter of reprimand." (Tr. 17).
>
> "A He asked me, 'What do you hope to gain from this?' He said, 'I can't see what you hope to gain from filing this grievance.'
>
> "Q What was your response?
>
> "A I told him that I had never had a chance to tell my side of the story and that I wanted that chance.
>
> "Q Did Mr. Spencer say anything else to you during that meeting?
>
> "A He said that word from Washington was, that if I pursued my grievance, that my career, the rest of my career would be made very difficult.

4/ (continued)

testimony. In some instances, for example, such as the finding paragraph 10, above, concerning the reaction of Chamberlin and Stroud to the grievance, I have credited Mr. Spencer's version as Mr. Reese's version, while it may have represented his personal reaction to the grievance, did not fully reflect what he told Mr. Spencer; but in this paragraph I credit Mr. Reese's testimony concerning the sequence of events leading to the meeting of September 9 as this seems more plausible.

> "Q Did Mr. Spencer ask anything else during that meeting?
>
> "A He asked me if this was my grievance or Don Wilson's.
>
> "Q What was your response?
>
> "A I explicitly told him it was mine, that I had made the decision on my own (Tr. 17-18).

Mr. Wilson testified, in part, that,

> ". . . There was some discussion on the fact that Jim Spencer told Mike Brines that upper level management adn (sic) Jim Reese and Elizabeth Stroud, people like that were unhappy with the fact that he had filed a grievance and they were wondering why he had filed a grievance, because they thought everything was hunky dory at the time of the letter of reprimand and he accepted it.
>
> "Q Did Mr. Brines respond to that in any way?
>
> "A Yes, he said he was unhappy with the letter of reprimand and he felt it was unjust.
>
> "Q Did Mr. Spencer say anything else during that meeting?
>
> "A He just went on to say there was still -- they were still unhappy with it and everything, and if he didn't withdraw it, that management may look unfavorably upon him . . . .
>
> . . . .
>
> "Q Did anything else happen during that meeting?
>
> "A Yes. There was some discussion on the fact that possibly I had put Mike Brines up to filing the grievance.

. . . .

> "A I turned around to Mike Brines and told him to explain exactly what had occurred. He told Jim Spencer that he had followed me up to Building 25, and he wanted to file a grievance." (Tr. 30-32).

Mr. Spencer testified, in part, as follows:

> "A I began by pointing out (sic) them that there seem to be some real misunderstanding and confusion about what had transpired here and how Mike felt about the decision . . . I probably said management was upset and confused and concerned, puzzled and they can't reconcile the things that häve transpired.
>
> . . .
>
> "A I pointed out to Mike also that as a result of this, I had already talked with Don Wilson, Don Fulsos rather, and Don had indicated that he believed that the reason for the grievance was over the divulgence of the decision to Dixie Woodhouse . . . Mike responded rather quickly to the effect that, no, he had initiated the grievance himself because he he in fact was dissatisfied with the decision . . . There was only a reprimand, but he did not mean to say that he was satisfied and that he says I still feel that I should have been vindicated.
>
> "Q What happened next at the meeting?
>
> "A I asked Mike then in view of this, had he considered what would be involved in processing the grievance and carrying it on to arbitration . . .
>
> "Q What did you mean by that?

> "A I was suggesting to him that there was going to be a substantial amount of time involved in resolving his grievance and I was curious as to whether he had given thought to this in as much as the grievance [reprimand?] itself was to remain in his official personnel folder for just one year, and I wondered whether it was going to be that much value to him considering the expense involved of carrying the grievance to its ultimate conclusion through arbitration . . .
>
> "Q What was his response?
>
> "A . . . he gave a distinct impression that regardless he wanted to purseu (sic) the matter . . . because if it was not, it would be perceived by many people that as essentially a concession on his part that there was some guilt there. He felt that if he didn't fight it, he wouldn't feel vindicated." (Tr. 51-54).

I found the testimony of Messrs. Brines and Wilson more convincing than Mr. Spencer's, although Mr. Spencer did not actually disagree in substance. Thus, I specifically find that Mr. Spencer told Mr. Brines that Guy Chamberlin was very unhappy that he, Brines, had filed a grievance over his letter of reprimand; that Mr. Spencer directly asked if the grievance were Brines' or whether Mr. Wilson had put him up to filing it; and that Mr. Spencer asked Mr. Brines what he hoped to gain from filing this grievance. I further find that Mr. Spencer told Mr. Brines that if he continued to pursue the grievance, the next time he got in trouble upper level management would not be so lenient with him. Mr. Wilson, who I found to be a wholly credible witness, so testified (Tr. 31, 35) and Mr. Spencer when asked if he had made this statement did not respond (Tr. 59). Moreover, such statement is wholly consistent Mr. Spencer's entire confrontation of Brines: Chamberlin is very unhappy that you filed a grievance; what do you hope to gain from filing this grievance, etc. I specifically do not credit Mr. Brines' testimony that Mr. Spencer said, ". . . if I pursued my grievance, that my career, the rest of my career would be made very difficult." (Tr. 18); however, Mr. Brines stated he couldn't remember Mr. Spencer's exact words (Tr. 22). Although Mr. Wilson initially testified essentially to the same effect (Tr. 31), he immediately modified it as I have found, above (Tr. 31), and on cross-examination made it clear that Mr. Spencer said, "we could go ahead and the next time it occurred, it might be so lenient with you. This was upper level management, not him" (Tr. 35). Not only did I find Mr. Wilson's testimony credible and convincing, but I find it difficult to believe that if such a threat as Mr. Brines testified was made, had been made in the presence of President Fulsos and Chief Steward Wilson it: a) would not have evoked some response from either Mr. Fulsos or Mr. Wilson (Tr. 22) and/or b) that such threat would not have been indelibly etched in the memory of Brines, Wilson and Fulsos. Mr. Brines was uncertain as to Mr. Spencer's exact words; Mr. Wilson stated positively that Mr. Spencer did not say that, but, rather, that he said that if Brines pursued his grievance, the next time he got in trouble upper level management would not be so lenient with him; and Mr. Fulsos did not testify.

13. Mr. Spencer asked Mr. Brines if he would be willing to speak to Mr. Reese (Tr. 19, 55) and, although Mr. Wilson advised Brines not to (Tr. 32), Mr. Brines said "Sure" (Tr. 19). Accordingly, Mr. Spencer called Mr. Reese and after speaking to Mr. Reese briefly, during which time Messrs. Wilson and Fulsos left (Tr. 19), handed Mr. Brines the telephone and Mr. Brines and Mr. Reese talked five to ten minutes (Tr. 23, 57, 81). Mr. Brines testified that Mr. Reese said,

> "A He said that Mr. Chamberlin was very upset or very unhappy that I had filed a grievance. He thought from Ms. Stroud, the word was, that I was pleased with the outcome, and that they wouldn't hear from me anymore.
>
> "Q What did you say to him?
>
> "A I told him that I had told Mrs. Stroud when she was here, that I was not pleased with the fact that nobody had ever listened to my side of the story, and nobody never asked me, and that was why I filed the grievance.
>
> "Q Did Mr. Reese say anything else to you during that phone conversation?
>
> "A He told me if I pursued my grievance, that the rest of my career could be very difficult.
>
> "Q How did your conversation with Mr. Reese end?

> "A Well, we got into an argument. He telling me, that I deserved what I got and I told him that I didn't feel that I was justly punished, and so I just handed the phone back to Mr. Spencer and told him we weren't getting anywhere." (Tr. 19-20).

Mr. Reese testified, in part, as follows:

> ". . . I then said to Mr. Brines what I am trying to clarify, Mr. Brines is Mrs. Stroud's statement that when she returned from Boulder, that you were evidently satisfied with Mr. Chamberlin's decision.
>
> "Q What was Mr. Brines' response?
>
> "A Mr. Brines' response was, that he was satisfied, but that I didn't understand, . . . you just don't understand this cloud hanging over my head. I didn't want this cloud hanging over my head while I am happy to have only received the written letter of reprimand, I am not satisfied, because I love the woman. I love Dixie Woodhouse and I won't be satisfied entirely until this matter is removed from my record, and I am found that I did not sexually harass Dixie Woodhouse. He continued on, and I don't remember the exact language, but in talking about my line of work . . . in my line of work in Boulder, it carries me through all the corridors in to different offices, and I am a tradesman and I can't help but bump into people, and Mrs. Woodhouse's statement that I am harassing her is just incorrect.
>
> "Q How did you respond?
>
> "A . . . And then I said to Mr. Brines, 'Okay. I think I understand. I assume now you will proceed along with your grievance, and that the grievance will be run through the negotiated grievance procedures as specified in the contract.' That conversation took four to six minutes at the most." (Tr. 79-80).

Mr. Reese denied that he made any statement to the effect that, "Mr. Brines, if you pursue your grievance, the rest of your career could be made very difficult for you." (Tr. 81).

Mr. Spencer testified that he paid little attention to Mr. Brines conversation with Mr. Reese, that he was busy on other matters and had a discussion with his secretary while Mr. Brines was talking (Tr. 56). He stated he heard only a couple of responses from Mr. Brines, something to the effect that management hadn't understood his position (Tr. 56) and saying he was unhappy because he didn't feel like he had been adequately heard, that nobody, no management official had discussed the issue personally with him (Tr. 57). To the extent Mr. Spencer heard Mr. Brines' conversation, his recollection fully corroborates Mr. Brines' testimony and I did not find Mr. Reese's convincing. Accordingly, I fully credit Mr. Brines' testimony concerning his conversation with Mr. Reese and specifically find that Mr. Reese told Mr. Brines that if he pursued his grievance the rest of his career could be very difficult.

Conclusions

A determination as to whether a statement violates § 16 (a)(1) must take into consideration all of the circumstances surrounding the making of the statement. Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 19 FLRA No. 114, 19 FLRA 956, 968 (1985). In the circumstances of this case, I find nothing in the meeting with Mr. Brines, at which he was well represented by the President and Chief Steward, to inquire why he had filed a grievance over his reprimand violative of the Statute, inasmuch as Mr. Brines had previously indicated that he was pleased to have received only a reprimand and not five day suspension without pay as initially proposed. But, Mr. Spencer went well beyond merely inquiring why Mr. Brines has filed a grievance. Although General Counsel presents a strong argument that Mr. Spencer's statement to Mr. Brines that the Director of Administration was very upset at his decision to file a grievance, violated § 16(a)(1), citing Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA No. 64, 11 FLRA 290, 298 (1983), under the circumstances of this case I have grave reservations that such statement standing alone violated § 16(a)(1) of the Statute; however, I find it unnecessary to decide whether such statement, standing alone, would, or would not, have constituted a violation of § 16(a)(1) for the reason that it does not stand alone. Thus, as I have found, Mr. Spencer: a) directly asked if Mr. Wilson, Chief Steward and Mr. Brines' representative on the grievance, had put him up to filing the grievance; b) asked Mr. Brines what he hoped to gain from filing the grievance; and c) told Mr. Brines that if he prusued the grievance, the next time he got in trouble upper level management would not be so lenient with him. Certainly collectively, Mr. Spencer's statements were more than sufficient to make an employee "think twice" before exercising his statutory right to file and process a grievance without fear or penalty and reprisal and violated § 16(a)(1) of the Statute. I can fully appreciate the reaction of a supervisor who believed he, or she, has extended a "favor" only to confronted with a grievance. Had I been the supervisor in Federal Election Commission, 6 FLRA No. 59, 6 FLRA No. 327 (1981), I have little doubt that my feeling would have been the same as his, namely that the grievant was the most ungrateful s.o.b. I ever met; nevertheless, to tell an employee that he was and to say that if left up to him he would see that the employee did not receive any further extensions of employment was a violation of § 16(a)(1) for the reason that it interfered with, restrained, and coerced the employee in his right to pursue his grievance. So too, did Mr. Spencer's statement, here, to Mr. Brines, that if he continued to pursue the grievance, the next time he got in trouble upper level management would not be so lenient with him. While I can understand Respondent's feeling, the statement to Brines, that if he pursued the grievance, the next time he got in trouble upper level management would not be so lenient with him, interfered with, restrained, or coerced Mr. Brines in his right to pursue his grievance.

Moreover, as I have further found, Mr. Reese, in his telephone conversation with Mr. Brines told Mr. Brines that if he pursued his grievance the rest of his career could be very difficult, a statement which, for reasons set forth above, clearly interfered with, restrained, and coerced Mr. Brines in his right to pursue his grievance.

Accordingly, having found that Respondent violated § 16(a)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. §2423.29, the Authority hereby orders that the National Bureau of Standards, Gaithersburg, Maryland, and National Bureau of Standards, Boulder Laboratories, Boulder, Colorado, shall:

1. Cease and desist from:

(a) Interfering with, or discouraging, by implied threats or other means, Michael T. Brines, or any other employee, from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

(b) Threatening Michael T. Brines, or any other employee, that they may have their employment adversely affected because they have filed a grievance under the negotiated grievance procedure.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at Boulder Laboratories, Boulder, Colorado, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of Administration and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region VII, Federal Labor Relations Authority, Suite 310, 535 16th Street, Denver, Colorado 80202, in writing, within 30 days of this Order, as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 28, 1986
Washington, D.C.

[7-CA-50629]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, or discourage, by implied threats or other means, Michael T. Brines, or any other employee, from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT threaten Michael T. Brines, or any other employee, that they may have their employment adversely affected because they have filed a grievance under the negotiated grievance procedure.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: __________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARMY AND AIR FORCE EXCHANGE
SERVICE, OHIO VALLEY EXCHANGE
REGION, CHARLESTOWN, INDIANA

Respondent

and

Case No. 5-CA-60065

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2302, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 11, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative actions.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative actions stated in the Order.

For the Authority.

Issued, Washington, D.C., July 24, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[5-CA-60065]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

ARMY AND AIR FORCE EXCHANGE
SERVICE, OHIO VALLEY
EXCHANGE REGION,
CHARLESTOWN, INDIANA

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2302, AFL-CIO

Charging Party

. . . .

Case No. 5-CA-60065

John F. Gallagher, Esquire
and
Rick Hampton, Esquire
For the General Counsel, FLRA

Ms. Lois Dye
For the Charging Party

Luther Griffin Jones, III, Esquire
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 *et seq*. (herein called the Statute). It was instituted by the Regional Director of Region 5 based upon an unfair labor practice charge filed on November 22, 1985 and first Amended Charge filed on February 3, 1986 by the American Federation of Government Employees, Local 2302, AFL-CIO, (herein called the Union), against the Army and Air

Force Exchange Service, Ohio Valley Exchange Region, Charlestown, Indiana (herein called Respondent). The Complaint alleged that Respondent violated section 7116(a)(1) and (2) of the Statute by lowering certain elements and the overall rating of an employee's Personnel Evaluation (herein called employee appraisal) because he sought assistance of the Union and informing that employee that the lowered appraisal was given to him because of his having sought union assistance.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Louisville, Kentucky at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. A timely brief was filed by the General Counsel and has been duly considered.[1] Respondent's closing argument has also been considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Mr. Ezra Hoover has been employed by Respondent as a maintenance man since August 1978. Since 1979 Mr. Hoover received six performance appraisals. The first 5 appraisals were perfect, giving him a point total of 30 and an overall rating of "Outstanding". 4 of those 5 appraisals were prepared by Martha Stoner, Chief Branch Supervisor and Mr. Hoover's first line supervisor. Mr. Hoover's first appraisal was prepared by Walter H. Martin.

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[1] The hearing was not closed in order to allow Respondent time to submit additional evidence for consideration. On April 28, 1986 Respondent submitted ALJ exhibits 1(a) through 1(e) for my consideration. On May 5, 1986 the General Counsel submitted a motion in opposition to Respondent's proposed stipulation and a motion to close the record. Thereafter, on May 15, 1986, Respondent submitted further correspondence which in essence corrected its April 28, 1986 submission. Having carefully considered all of the above submissions, I deny the General Counsel's opposition to the stipulation and accept ALJ exhibits 1(a) through (e). Finally, the General Counsel's motion to close the record is granted. Therefore, the record is deemed closed as of May 15, 1986.

On August 23, 1985, Mr. Hoover received his sixth appraisal which covered the appraisal period from May 14, 1984 to May 31, 1985. This appraisal like 4 others before it was prepared by Ms. Stoner. Unlike the previous 5 however, Hoover's overall numerical rating dropped from 30 to 26 and his overall rating was lowered from outstanding to "Very Good." Instead of receiving a perfect 5 rating he received the following ratings in three elements: Quantity of Work - 4, Adaptability 4 and Cooperation and Disposition 3.

On August 23, 1985, Mr. Hoover's appraisal was reviewed with him by Ms. Stoner. During the meeting, Ms. Stoner did not give any example of Hoover's work which justified the lowering of any of the job elements. Mr. Hoover, who does not read or who reads poorly asked Ms. Stoner why he had received a lowered appraisal. According to Mr. Hoover, Ms. Stoner replied that his attitude in the department had gone down so low; and she stated "[T]hat's all you're going to get. [T]hat is what you get for going to the Union."

The record reveals that in 1985 prior to receiving his appraisal, Mr. Hoover sought the assistance of the Union concerning two incidents. The first occasion followed a June 13, 1985 counseling by Ms. Stoner concerning an incident involving Helen Kathleen Hashem, Stoner's assistant who was acting as Hoover's supervisor in Stoner's absence between June 10 and 12. Mr. Hoover apparently was unaware of the fact that Ms. Hashem had the authority to act as his supervisor. Mr. Hoover complained to Ms. Dye, a Union Vice-President about the counseling and Ms. Dye in turn, spoke with Ms. Stoner about the counseling on June 14, 1985. According to Ms. Dye, Stoner told her that Mr. Hoover had been informed of Hashem's supervisory status by memorandum which had been posted. Again it is noted that Mr. Hoover could not read or read poorly and that all his work orders had to be read to him. Such a situation creates the improbability that Mr. Hoover would have been aware of Hashem's position by virtue of any posted memorandum. Further, Mr. Hoover's response to Hashem concerning "who made you boss" when the conflict occurred helps to establish that he was unaware of her position as a supervisor.

Mr. Hoover again sought the assistance of the Union on August 21, 1985. On that date, Ms. Stoner, in a meeting with Mr. Hoover, refused to approve Hoover's request for sick leave. Mr. Hoover stated he would get the Union in on it and telephoned Ms. Dye from Stoner's office and in her presence. Ms. Dye met shortly thereafter with Ms. Stoner and Mr. Hoover to discuss the problem. Later that day, Ms. Stoner, in a brief meeting with Mr. Hoover and Ms. Dye, approved the sick leave.

Mr. Hoover received 6 awards during his career with Respondent. The last was an impressive 5 year proficiency award which he received on April 23, 1985. The award covered the period April 1982 to February 1985. He was recommended for an even higher award for that period by Ms. Stoner but other management officials determined to give him only the proficiency award. Ms. Stoner recommended the award on February 19, 1985.

A Supervisor/Employee Communication form which showed all counseling of Mr. Hoover beginning February 11, 1980 and ending August 23, 1985 reveals 10 entries. Of the 7 entries included on page 1 of the form, 5 commend his performance, attitude and work as exceptional, "excellent" or "outstanding"; 1 session was merely to discuss Standards of Conduct although Mr. Hoover states that his touching of females was also discussed; and, 1 dated January 5, 1984 discussed his "touching females." It should be noted that while Mr. Hoover was counseled during the 1983-1984 appraisal period concerning "touching females," he received a 30 point total and an outstanding rating for that period. Furthermore, Mr. Hoover did not admit to any wrongdoing when counseled about the accusation. Although he was counseled, no formal complaint was ever filed, no formal investigation was ever conducted and no official document was ever recorded which indicates that Respondent had officially concluded Mr. Hoover had improperly touched another employee. Also Hoover's counseling record during the sixth appraisal period reflects no further active problems in that area of concern.

Page 2 of the counseling form confirms discussions with Mr. Hoover on June 13, 1985 concerning Hashem; the sick leave situation which occurred 2 days before he received his appraisal; and the discussion with Ms. Stoner when he received the 1985 appraisal. The August 23, 1985 entry, reads, in part, as follows:

> told him he can improve in quantity of work, adap[t]ability to changes, and working with others in the branch, and stop gossiping.

While Respondent contends that Mr. Hoover was made aware of these problems during the course of the appraisal period beginning sometime in February 1985 there was no documentary evidence presented to substantiate any concern with his work other than the counseling sheets already mentioned. Furthermore, as already mentioned Mr. Hoover was recommended for an excellence award for the preceding 5 year period, during the time the problems allegedly were occurring. Somewhat inconsistent action by Ms. Stoner.

Ms. Stoner signed Hoover's completed 1984-85 performance appraisal on August 22, 1985. That appraisal form, contained inter alia, the following instructions to the rating official:

> GENERAL - You are asked to review the work performance of each HPP Supervisor based on the performance elements listed on the front of this form. RATE ONLY ON PERFORMANCE IN PRESENT POSITION: RATE ONLY ON PERFORMANCE UNDER YOUR SUPERVISION OR DURING INCLUSION PERIOD OF THIS REPORT. Refer to employee's job description.
>
> PERFORMANCE - Read the description for each performance element carefully and the employee performance rating guide provided; then circle the numerical rating that best describes the employee's performance for that element. A rating of 5, 2, or 1 requires justifying comments in the space provided. Enter the numerical rating in the "SCORE" block to the right of each element. Total the numerical ratings and enter the results in the "TOTAL SCORE" block.
>
> OVERALL EVALUATION - Select the appropriate rating based on the "TOTAL SCORE". Supporting comments of Rater must justify any ratings of Outstanding, Marginal or Unsatisfactory.
>
> RATER - You are expected to be able to explain any rating you have given, or comments made.

Ms. Stoner was aware of Respondent's regulations requiring that records of counseling sessions be noted on the employee's counseling card. In addition, Ms. Easley, the Operations Specialist in Personnel at the Activity, advised Ms. Stoner sometime in June 1985 that counselings must be documented.

Ms. Stoner's testimony reveals no discussion of specific examples of problems with Mr. Hoover's work performance during the appraisal period in question. Indeed her testimony creates certain inconsistencies which must be dealt with on the basis of credibility determinations. Allowing for nervousness and the newness of testifying in this type proceeding it must be noted that Ms. Stoner was not a very good witness. Each of the alleged problems will be dealt with separately.

First, it was contended that Mr. Hoover had been counseled on numerous occasions and numerous complaints were received concerning Mr. Hoover touching female employees.

Clearly there were 2 counseling sessions concerning touching females and one occurred outside the appraisal period. As to the accusation that Mr. Hoover continued to touch females improperly, the record reveals that if such conduct did occur, it was never substantiated. Furthermore, there is insufficient evidence in the record to establish that the numerous alleged touching occurred during the 1984-1985 appraisal period in question. Mr. Hoover testified that he was counseled twice concerning touching females, the last time occurred during the April 30, 1985 discussion of employee standards although there had been no incidents. While Ms. Stoner's demeanor and testimony indicated that she viewed this "problem" seriously, a problem which had allegedly been going on for years and over which her superior warned her that Mr. Hoover would be fired if it happened again, Ms. Stoner gave Mr. Hoover a perfect appraisal for the period immediately before the one at issue, despite his having been counseled concerning touching of females during that period. Ms. Stoner also testified that she warned Hoover about putting his hands on females just before Hashem assumed her job in February 1985. However, there is no suggestion from Stoner or Hashem that there was any problem in that regard. Finally, it must be remembered that while Hoover's conduct towards females was allegedly always a problem, Ms. Stoner not only recommended Mr. Hoover for an excellence performance award in February 1985, but Respondent gave him that performance award on April 23, 1985, approximately 1 month before the end of the appraisal period. It does not make sense that Ms. Stoner would recommend Mr. Hoover for an award, and that Respondent would give him an award, if this problem existed.

Ms. Stoner testified that she had to order Mr. Hoover to remove sexually explicit pictures from his locker in anticipation of Hashem's arrival. There is no suggestion that Mr. Hoover resisted removing the pictures which had apparently been on his locker for years and which Ms. Stoner was seemingly aware of during the period she had rated him outstanding. I see no connection between this incident and the lowered appraisal.

There was also an allegation that Mr. Hoover was unable to deal effectively with a co-worker, Karis Hardin. The evidence reveals that if a problem in fact existed, it was an insignificant one. Ms. Hardin testified that she had no knowledge as to Hoover's practice prior to her appointment to the position which involved the duty of keeping track of OVER vehicles, that she was not present when Mr. Hoover would take a vehicle for which he was authorized, that although she was displeased with the procedures Mr. Hoover followed, she did not confront him, and that, apparently, after Ms. Hardin complained to Ms. Stoner, Mr. Hoover did report to Ms. Hardin before taking a vehicle. I do not view this situation as one concerning any of reasons why Mr. Hoover's appraisal was lowered.

Respondent claims that Mr. Hoover's was unable to deal effectively with Ms. Stoner's assistant, Hashem. Concerning Hoover's alleged problem with Ms. Hashem, Ms. Stoner testified that this problem not only included Hoover's difficulty in getting along with Ms. Hashem but insubordinate behavior when Ms. Hashem was Hoover's acting supervisor. According to Ms. Stoner, Mr. Hoover refused to listen or to take any instruction whatsoever from Cathy Hashem. There is no record support for this testimony. Hashem who came into Administrative Services in February was responsible for directly supervising 3 mail clerks, one Administrative Services clerk, and the receptionist. Along with this she coordinated Mr. Hoover's work by reading work orders to him. Her only supervisory authority over him occurs during Ms. Stoner's absence. Hashem states that she had a problem relating to Hoover who was reluctant to take instructions from her, who was uncooperative, insubordinate and did not want to relate to her. She is not aware of the reason why the problem existed except that in 1980 she reported Hoover for touching a female and she had filed a sexual harassment charge against a former supervisor. She speculated that Hoover did not know she had reported him in 1980, but that he was aware of her sexual harassment complaint. Hashem's testimony that Ms. Stoner spoke frequently to Mr. Hoover, in her presence is not supported by the record. While at least one incident did occur on June 10, 1985, it has also been established that Mr. Hoover was not aware that Ms. Hashem then was his acting supervisor. Although Ms. Stoner testified that she told Mr. Hoover that Ms. Hashem would be his supervisor in her absence in a January 1985 meeting, credible evidence demonstrates her testimony is not believable. First, there is no documentation of that meeting. Second, Mr. Hoover testified that he was unaware of Hashem's supervisory status in Stoner's absence until he was counseled concerning it on June 13, 1985. Although Ms. Stoner did state in the counseling record that she advised him of that fact, there is no indication that she had advised him on any earlier occasion, or that there was any prior counseling on the matter. According to Hashem, Hoover asked her "who made her boss" and said that he did not have to take any orders from her because he was a higher grade. Ms. Dye credibly testified that when she asked Ms. Stoner on June 14 how Mr. Hoover would have known that Ms. Hashem was his acting supervisor, Ms. Stoner mentioned a memorandum which was posted prior to her absence in June but, as already noted, Hoover cannot read. Also Ms. Hashem testified that she did not believe that Mr. Hoover was aware that she was acting supervisor in June. If indeed Hoover was insubordinate to Hashem, the record only supports such conduct on June 10, 1985 or outside the period for which he was being rated. I credit Hoover and Dye in this instance in finding that the problem attributed to Mr. Hoover about Hashem were pretexual.

There is also an allegation that Mr. Hoover was insubordinate to Hashem while she acted as supervisor in Ms. Stoner's absence during which time he refused to do any work.

The record clearly established that Mr. Hoover was unaware of Hashem's acting supervisory status on June 10, 1985 and reveals further that the alleged Hoover-Hashem problem was limited to that day although Ms. Stoner testified otherwise. Because Ms. Stoner was not on leave for a two week period, contrary to her testimony, Mr. Hoover could not have been insubordinate (refused to work) to Ms. Hashem throughout that period. Ms. Hashem testifies that she was upset with Mr. Hoover over the June 10 incident but does not indicate that Mr. Hoover was insubordinate to her during any other time, including any specific two week period. The notation entered into the counseling record by

Ms. Stoner on June 13, 1985 reveals no concern as to Hoover's alleged constant insubordination when Ms. Hashem was acting supervisor. Finally, it is even more significant to note again that the June 10 Hoover-Hashem incident occurred outside the appraisal period and therefore, as clearly indicated in the appraisal form, should not have been considered in Hoover's May 1984 - May 1985 appraisal.

Ms. Stoner testified that she gave a "4" rating on Hoover's quantity of work element because his quantity had dropped. One must assume that this is in support of the allegation that Mr. Hoover was not performing his duties in a timely fashion. However, no signed and dated work orders or any other documents/statistics were introduced to support this claim. The only specific example Ms. Stoner could give of Hoover's quantity dropping or delay in completing work orders was a painting problem, but here again Ms. Stoner did not know if the delay was legitimate or not. Ms. Hashem also testified that there were minor things that "we think maybe he didn't perform." However, she felt that overall he was doing his job.

Ms. Stoner also justified lowering the appraisal because Mr. Hoover gossiped. The record reveals that this was not a problem at all for purposes of the appraisal period. The "problem" arose, if at all, after the closing of the appraisal period. In addition, the record reveals that there was actually no problem since Ms. Stoner testified that it is not unusual for OVER employees to stop other employees to spend a few minutes talking over matters not related to work. Finally, Ms. Stoner cited no examples of Mr. Hoover not cooperating with her although this was one of the reasons for lowering the appraisal.

In summary, Stoner's testimony concerning her reasons for lowering Hoover's appraisal is inconsistent, contradictory, and is not credited. Although, she indicates her belief that Mr. Hoover had serious performance problems, she rates him as a "Very Good Employee" overall when seemingly she should have lowered his rating with all these problems to at least satisfactory.

It is hard to believe that an employee doing the same work, without some sort of real problem, could go from outstanding to satisfactory in one appraisal period. It is even more unbelievable that no more would be done about it than what was done here.

When the problems Mr. Hoover allegedly had are examined individually, the record establishes no problems of any significance existed. In spite of the fact that Ms. Stoner knew it was her duty to document performance problems, no documentation of specific problems exists. Moreover, Ms. Stoner could not cite any specific examples of Hoover's alleged problems nor could she be specific enough to determine the dates of the problems in order to ascertain whether the problems arose during the appraisal period in question. Finally, although Ms. Stoner recognizes that the appraisal period ended on May 31, 1985, she gave no reason for considering, in Hoover's appraisal, situations (e.g. June 10 Hashem incident and gossiping) which occurred after May 31.

According to Stoner's testimony, she began drafting Hoover's appraisal after May 31, 1985 while she was on two weeks of annual leave due to the illness of her mother. She returned to work on June 12, 1985 and talked to Pat Easley that day after learning of the incident between Ms. Hashem and Mr. Hoover. Evidence submitted by Respondent after the hearing as discussed infra. indicates that there was no such absence. Ms. Stoner testified that she did not complete the draft until sometime late in June. She typed it on August 16, making no changes from the original draft except raising one element rating from a "2" to "3." She did not sign the appraisal until August 22 because she wanted Mr. Maddin to see it first. A careful review of the record creates more than a suspicion that Ms. Stoner's testimony is not credible.

Although Ms. Stoner testified that she was on annual leave for two weeks prior to June 12, 1985, her attendance records for that period and the testimony of Hashem contradict her testimony. According to that evidence, Ms. Stoner was in duty status from June 1 through June 28. From June 3 through June 7 and June 13 through June 28, Ms. Stoner was at the Activity. From June 10 through June 12, Ms. Stoner was on temporary duty (TDY) at Offutt AFB, Nebraska. Based upon her attendance records, Ms. Stoner could not have begun drafting Hoover's appraisal during the first two weeks of June while on annual leave, as she testified, because she was not on annual leave. Even assuming that Stoner's testimony that she did not begin Hoover's appraisal before June 1, 1985 and that she began it while she was on two weeks of leave (whenever that may have been) can be credited, the initial drafting of Hoover's appraisal could not have begun before July 1, 1986.

Stoner's testimony that she completed Hoover's appraisal on August 16 also is not credible. Ms. Stoner states that she recalls that it was August 16 because that was when an employee went on military leave. However, I see no reasonable presumptive connection between the military leave of one employee and the typing of another employee's appraisal. Furthermore, no evidence was provided which would make such a connection. Nor were there military leave records of the employee produced by Respondent to confirm that date. Ms. Stoner also testified that she did not sign the appraisal because she wanted the reviewing official, Mr. Maddin, to see it before she signed it. However, she subsequently testified that she signed it before Mr. Maddin reviewed it.

In summary, based upon Respondent's own witness' testimony and documents, there is insufficient credible evidence to find that Ms. Stoner began to draft Hoover's appraisal prior to June 28, 1985 and there is insufficient evidence to find that Ms. Stoner completed Hoover's appraisal prior to August 22, 2985. In addition to the inconsistencies and contractions in her testimony which were discussed above the evidence reviewed demonstrates that it is impossible to determine when Ms. Stoner began to draft Mr. Hoover's appraisal. And the only credible date for completion of the appraisal is August 22, 1985, the day she signed it.

Conclusions

The General Counsel urges that Ms. Stoner's August 23, 1985, statement to Mr. Hoover that his lowered appraisal was the result of his going to the Union violated section 7116(a)(1) of the Statute. See Federal Mediation and Conciliation Service, 9 FLRA 199 (1982); See also National Weather Service Training Center, Kansas City, Missouri, 16 FLRA 379 (1984).

There is no question that such a statement made in the context of reviewing an employees' appraisal with him would constitute a violation of the Statute.

The credited evidence in this matter clearly established that Mr. Hoover sought Union assistance on at least two occasions shortly before he received his appraisal in August 1985. It further reveals that Ms. Stoner indeed made the statement which constituted a threat that this was what Mr. Hoover got for going to the Union and carried with it the implication that Mr. Hoover would continue to receive lowered appraisals if he persisted in seeking Union assistance.

Accordingly, in all the circumstances of the case, it is found that Ms. Stoner's statement to Mr. Hoover on August 23, 1985 "[t]hat's all you're going to get. [T]hat's what you get for going to the Union" violates section 7116(a)(1) of the Statute.

As Respondent pointed out in its closing statement at the hearing, this is purely a matter on credibility. The question here is simply whether Ms. Stoner made the statement to Mr. Hoover and whether her preparation of his 1984-85 appraisal after he went to the Union for assistance on two occasions was influenced by his action in engaging in protected activity.

If the Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981) analysis is used as the test in this matter the General Counsel made a prima facie showing by the credited evidence that Mr. Hoover engaged in protected activity by seeking and securing Union assistance during the Hashem incident and his sick leave problem. Further, it was shown that he received a lowered personnel appraisal after engaging in such protected activity and that the lowered appraisal was influenced by his engaging in those protected rights.

Ms. Stoner's telling Mr. Hoover that was what he got for going to the Union establishes that Hoover's actions were indeed a motivating factor in her decision to lower his appraisal. Despite Respondent's argument to the contrary this statement also operates to establish animus,on Stoner's part.

Under the IRS test supra, Respondent now has the opportunity to show by a preponderance of the evidence that it would have reached the same decision on the appraisal even in the absence of the protected activity. In my opinion, Respondent failed to establish by a preponderance of the credited evidence that Mr. Hoover's 1984-85 appraisal would have been lowered even had he not gone to the union on the two occasions mentioned above.

Respondent attempted to demonstrate that serious problems existed with Mr. Hoover including things such as insubordination, a decrease in quantity of work, inability to get along with fellow employees and the improper touching of females.

The irony here is that Mr. Hoover was apparently considered a model employee by Ms. Stoner and her predecessor until he had difficulty with Hashem and sought Union assistance in the matter. Looking back on Mr. Hoover's record, it is clear that he had touched females prior to 1985 and that he was counseled at least once for such offense. Although I disapprove of such conduct Respondent seemed willing to live with it since Mr. Hoover received an outstanding rating for that year and a 5 year proficiency rating despite what Respondent now claims was reprehensible behavior. It is found that the problem with touching females preexisted any protected activity and Respondent had never taken this into account when rating Hoover prior to 1985 and that it cannot now use such conduct as a legitimate reason for lowering Mr. Hoover's appraisal.[2] The same must be said of the sexually explicit pictures Mr. Hoover kept in his locker area. This seemingly was general knowledge and had not been held against him to lower his appraisal prior to his having engaged in protected activity.

The other alleged reasons for lowering the appraisal are not supported by credited record evidence or documentation. The only problem area which clearly existed was Mr. Hoover's difficulty with Hashem in early June. He was counseled at that time for what appeared to have been a misunderstanding about "Delegation of Authority, Cathy Hashem is in Charge in my stead." The trouble here no doubt arose over Mr. Hoover's inability to read and apparently is the first time, despite assertions to the contrary that he was ever told that Hashem was his supervisor in certain situations. The record clearly indicates that Hashem only coordinated Hoover's work when Stoner was in the office. It shows no other instances where she acted as his "supervisor" either when Stoner was present or when she was absent from the office. It therefore, is found that Mr. Hoover was not aware of her status until Ms. Stoner told him on June 13. While Hashem may have perceived Hoover was insubordinate it is clear that he was acting on the premise that she was not his supervisor, which the facts support. He obviously only became aware, since he could not read, only when told of the delegation on June 13. This counseling session, as it was written, did not suggest that up until that point Mr. Hoover had done anything wrong. Finally, even Hashem admits that after Hoover learned of her supervisory status his relationship to her changed.

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[2] Hoover was warned about his problem in that regard when counseled on April 30, 1985 concerning employee standards of conduct. There is no suggestion that Hoover had violated any standards or that he was being counseled about active conduct.

With regard to the other alleged problems during the 1984-85 appraisal period, I find too many contradictions to rely on the testimony of any of Respondent's witnesses concerning Mr. Hoover's work habits which seemingly had begun to rapidly deteriorate starting around February 1985 or just about the time Hashem arrived on the job. Moreover, the real complaints about Hoover seemed to have taken place after June 1 or outside the rating period for which his appraisal was lowered. Accordingly, it is found that Respondent did not establish on this record that its action on Mr. Hoover's appraisal for the period May 1984 - May 1985 would have been the same even in the absence of his protected activity.

Based on the foregoing, it is found that Respondent violated section 7116(a)(2) and (1) by lowering the 1984-85 appraisal of Mr. Hoover because he sought assistance of the Union.

Having found and concluded that Respondent violated section 7116(a)(1) and (2) of the Statute, I recommend that the Authority issue the following order designed to effectuate the purposes of the Statute.

ORDER

Pursuant to section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7118(a)(7)(A), and section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. section 2423.29(b)(1), the Authority hereby orders that the Army and Air Force Exchange Service, Ohio Valley Exchange, Charlestown, Indiana shall:

1. Cease and desist from:

    (a) Reducing or otherwise lowering employees' Outstanding employee appraisal because of their activities on behalf of the American Federation of Government Employees, Local 2302, AFL-CIO.

    (d) Making statements to employees that their employee appraisals are being lowered because of their activities on behalf of the American

Federation of Government Employees, Local 2302, AFL-CIO.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute.

(a) Raise Ezra Hoover's May 1984-85 employee appraisal to a 30 point total and an overall rating of outstanding and restore to him any right or privilege he may have lost as a result of his original lowered May 1984-1985 appraisal.

(b) Post at its Army and Air Force Exchange Service, Ohio Valley Exchange Region, Charlestown, Indiana facilities copies of the attached motive marked "Appendix", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed signed by the Commanding Officer and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

ELI NASH, JR.
Administrative Law Judge

Date: June 11, 1986
Washington, D.C.

[5-CA-60065]

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Ezra Hoover by lowering his May 1984-1985 employee appraisal from outstanding because of his protected union activity on behalf of the American Federation of Government Employees, Local 2302, AFL-CIO.

WE WILL NOT make statements to Ezra Hoover that his employee appraisal is being lowered because of his union activity on behalf of the American Federation of Government Employees, Local 2302, AFL-CIO.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL raise Ezra Hoover's May 1984-1985 employee appraisal to a 30 point total and an overall rating of outstanding and restore to him any right or privilege he may have lost as a result of his original lowered 1984-1985 appraisal.

____
(Agency or Activity)

Dated: ________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 5, whose address is: 175 W. Jackson Blvd., Suite A-1359, Chicago, IL 60604 and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION

Respondent

and

Case No. 2-CA-50349

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, COUNCIL 220

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 13, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., July 24, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[2-CA-50349]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, COUNCIL 220

Charging Party

Case No. 2-CA-50349

Irving L. Becker, Esquire
For the Respondent

Mr. Pedro Romero
For the Charging Party

Barbara S. Liggett, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an amended unfair labor practice complaint issued by the Regional Director, Region II, Federal Labor Relations Authority, New York, New York against the Department of Health and Human Services, Social Security Administration (Respondent), based on an amended charge filed by the American Federation of Government Employees, AFL-CIO, Council 220 (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq.

(the Statute), when it changed working conditions of bargaining unit employees in the San Juan District Office at its Rio Piedras location by changing the telephone audit procedure utilized to gather performance data. The complaint alleges that Respondent made this change without giving the Charging Party prior notice and an opportunity to negotiate over the change. Respondent's answer admitted the jurisdictional allegations as to the Respondent, Charging Party, and the charge, but denied that it had changed working conditions or violated the Statute.

A hearing was held in Hato Rey, Puerto Rico. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO, (hereinafter referred to as AFGE), is the exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including employees in Respondent's San Juan District Office.[1] AFGE has delegated to the Charging Party authority to act as its representative for the purposes of collective bargaining for certain employees, including employees in the San Juan District Office, and this delegation has been recognized by Respondent. A collective bargaining agreement, effective June 11, 1982, is currently in effect between AFGE and Respondent.

Since on or about January 25, 1985, Ana Cabon and other supervisors in Respondent's San Juan District Office at its Rio Piedras location have conducted telephone audits of claims development clerks and one claims representative. The procedure has been for the supervisor to give the employee prior notice of the telephone audit and then to sit next to the employee for approximately one hour and listen as the employee answers telephone calls and speaks with the callers. The supervisor later gives the employee a documentation worksheet or telephone interview audit worksheet which sets forth the results of the audit. The audit is then used by the supervisor to document performance under the performance appraisal system.

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[1] Section 1(E) of the Union's charge states the number of employees employed by Respondent as approximately 80,000. According to counsel for Respondent, there are approximately 60,000 bargaining unit employees.

Three employees testified that prior to January 1985 employees never had telephone audits conducted in this manner; that is, with employees being made aware that their supervisors would be listening specifically to their telephone calls during a particular period. They were aware that dealing with the public on the telephone was a part of their jobs, and that they were evaluated on their telephone performance. However, since the office is small, with everyone working close to everyone else, they assumed that the supervisors just casually overheard their telephone conversations from time to time in order to make the appraisals.

After becoming aware of the telephone audits after January 1985, some employees expressed several concerns to Union representatives Iris Picart and Santos Mercado and questioned why the audits were being done. They were nervous and anxious about the procedure. They had heard that not all employees were being audited. They were concerned that they might be evaluated differently. They said they were given short notice and were worried they would perform poorly if they were not prepared, or might be evaluated on a call requiring information for which they had not been trained.

During the period January 25, 1985 to May 23, 1985, the Union, by Iris Picart, requested to bargain on the impact and implementation of the telephone audit procedure. The Union submitted proposals on May 23, 1985. By letters dated February 15, 1985 and June 3, 1985, Respondent, by Assistant District Manager Enid I. Ortiz, refused to bargain on the grounds, inter alia, that telephone audits had always been conducted in the office and were the same supervisory audit methodology used throughout the Region.

A Training Guide for Supervisors, "Documenting Performance under the SSA Performance Appraisal System," published by Respondent's New York Region in July 1982, reflects, in part, under "Audits" that "[i]n assessing performance, supervisors must rely upon day-to-day observations as well as the more formal mechanisms of desk audits, interview audits, and mail audits. The audits are to focus on the generic job tasks (GJT) shown on the employee's performance plan." The Guide also states that the "continuous sample" approach may be adopted as an alternative to the formal audits. An audit guide is provided for claims development clerks and others as well as a documentation worksheet listing the generic job tasks. The audit guide for claims development clerks states that the audit of the position should include a telephone audit.

A memorandum from the District Manager, San Juan, Puerto Rico to Operations Supervisors dated March 5, 1982 restates the purpose of audits as reflected in the above Guide and encloses a schedule for a round of audits. The memorandum states that "there will not be any unannounced, impromptu audit for any position type."

Respondent presented the testimony of three supervisors whose testimony I credit. This testimony reflected that since at least July 1982 employees in the San Juan District Office at its Rio Piedras location have been audited on their telephone performance on generic job task 64 (which deals with contacts with beneficiaries and the public in general) by supervisory observation of their work in a manner consistent with the Guide issued by Respondent's New York Region. The telephone audit of employees has been conducted by various supervisors using a combination of methodologies. Some supervisors have used direct observation consisting of the supervisor sitting adjacent to the employee on a scheduled basis and specifically listening in on the calls, and some supervisors have listened in on the employee's telephone conversations while in the general work area on a day-to-day basis. Some supervisors have used a combination of these methods. Miriam Alvarez, an operations supervisor in a branch office of the San Juan District, was aware of the practice in the Rio Piedras office through management meetings. Enid I. Puig (Ortiz), former Assistant District Manager, was aware of the practice through the published guides and memoranda, by seeing supervisory audit schedules, by talking to the supervisors, and by observing supervisor's sitting next to employees while the employees were on the telephone.

A documentation worksheet for Andres Rodriquez, claims development clerk, dated August 12, 1982, reflects, in part, "Invariably you're polite and helpful when called upon to deal with the public on the telephone or in person." A documentation worksheet for Iris Picart, claims development clerk, for the period ending June 1984 states, in part, "As I indicated in your audit, you have a pleasant and tactful manner when dealing with claimants on the phone or personally."

Discussion, Conclusions, and Recommendations

The General Counsel contends that Respondent violated section 7116(a)(1) and (5) of the Statute by impementing a formal telephone audit procedure without giving the Charging Party notice and an opportunity to bargain concerning the impact and implementation of the change. The General Counsel claims that Respondent's action constituted a change which had a reasonably foreseeable impact on conditions of employment which was more than de minimis.

Respondent defends on the basis that (1) no change in telephone audit procedures occurred in January 1985; (2) assuming such a change, it was de minimis and no bargaining obligation arose; (3) the Respondent had no duty to bargain the audit procedure locally, and (4) the Union's proposals were untimely.

The basis of the complaint in this case is that the Respondent changed from an informal, unscheduled day to day observation of telephone performance to a formal, regularly scheduled "sit down" telephone audit as part of the ongoing appraisal process of bargaining unit employees. I have credited the testimony of Respondent's witnesses and found that supervisors have, since at least 1982, regularly audited the telephone work of bargaining unit employees in the San Juan District Office at Rio Piedras by informal means as well as by formal, regularly scheduled audits. Thus, the procedures used since January 1985 have remained within the ambit of discretion which supervisors could and did exercise within that Office and within the region. As there was no change in conditions of employment with regard to the bargaining unit, the Respondent was under no obligation to bargain over such matters, and did not violate section 7116(a)(1) and (5) of the Statute, as alleged. See Social Security Administration, 19 FLRA No. 79, 19 FLRA 622 (1985), wherein the Authority held that the activity did not violate section 7116(a)(1) and (5) when one of its supervisors decided to use a continuous audit method of evaluating employee work performance in lieu of an annual desk audit method used by her predecessor. The Authority concluded that the supervisor's change in methodology did not constitute a change in conditions of employment where her procedures remained within the established ambit of discretion which supervisors could and did exercise within the activity's offices.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

IT IS HEREBY ORDERED, that the Complaint in Case No. 2-CA-50349 be, and it hereby is, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 13, 1986
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS,
MEDITERRANEAN REGION
(Madrid, Spain); and ZARAGOZA
ELEMENTARY SCHOOL (Zaragoza,
Spain)

Respondent

and

Case No. 1-CA-50145

ZARAGOZA FEDERATION OF
TEACHERS, LOCAL 1550, AFT

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 19, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., July 29, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS,
MEDITERRANEAN REGION
(Madrid, Spain); and ZARAGOZA
ELEMENTARY SCHOOL (Zaragoza,
Spain)

Respondent

and

Case No.: 1-CA-50145

ZARAGOZA FEDERATION OF
TEACHERS, LOCAL 1550,
AFT

Charging Party

Joseph Caneva, Esq.
For the Respondent

Ernest J. Lehmann
For the Charging Party

Peter F. Dow, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the Zaragoza Federation of Teachers, Local 1550, AFT (herein Local 1550) against the above captioned Respondent, the General Counsel of the Authority, by the Acting Regional Director for Region I, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to recognize Charlotte T. Cross as a representative of the exclusive representative during various formal discussions being conducted by agents of Respondent and the exclusive representative.

A hearing on the Complaint was conducted in Zaragoza, Spain at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by counsel for Respondent, and counsel for the General Counsel and have been carefully considered.[1]

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein the Overseas Federation of Teachers, AFT, AFL-CIO (herein sometimes the Union or OFT) has been the exclusive collective bargaining representative of various employees of the Department of Defense Dependents Schools, Mediterranean Region (sometimes referred to as DODDS, Mediterranean or Respondent DODDS) including teachers and other professional employees at the Elementary School and High School located in Zaragoza, Spain. Local 1550 is a constituent body of the Union with various officers and an Executive Committee.

In October 1982 OFT and DODDS Mediterranean commenced negotiations for a collective bargaining agreement covering employees in the certified bargaining unit including employees located in Zaragoza. After reaching impasse in negotiations sometime in April 1983, Respondent DODDS filed a request for assistance with the Federal Service Impasses Panel (herein the Panel). Subsequently the Panel referred the matter to Robert G. Howlett, who was at that time the Panel Chairman, for mediation-arbitration, vesting Chairman Howlett with authority to mediate with respect to the issues at impasse and render a binding decision on any unresolved issues. The vast majority of the issues involved were resolved during the mediation phase. However, some issues were not resolved during the mediation process and Chairman

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[1] Counsel for the General Counsel's unopposed motion to correct the transcript is hereby granted.

Howlett conducted hearings on September 22 and 23, 1983 to address these issues.

On December 8, 1983 Chairman Howlett issued his "Arbitrator's Decision and Opinion". In that document Chairman Howlett indicated the various issues on which he "issued decisions" during the mediation process. He also indicated that there were other ". . . issues on which the parties were unable to agree, or which (he) did not direct be included in the contract. . ." which related to Article 9, Article 10 and another contract provision. These issues were the subject of the hearings previously conducted by Chairman Howlett on September 22 and 23, 1983.

With regard to Article 9, apparently prior to Chairman Howlett's intervention the parties had agreed to numerous sections of this Article with the exception of Section 2.b. and 4.[2] However, as revealed in the "Arbitrator's Opinion and Decision", Article 9, Section 2.b. resulted from mediation and the language of Article 9, Section 4, which was still in dispute after mediation, was directed for inclusion in the contract by Chairman Howlett in his December 24 decision.

With regard to Article 10, after discussing the parties' proposals and the evidence, Chairman Howlett in his December

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[2] Article 9, Section 3, which the parties apparently agreed to without Chairman Howlett's assistance provides, in relevant part:

> "Section 3. Recognition of Representatives. The Employer agrees to recognize the elected officers and duly designated representatives of the Union. The Union shall notify the principals of individual schools in writing of its representatives and any changes thereto. The Union will provide the Employer with a complete listing of representatives by school as soon as possible after the beginning of each school year.
>
> "a. The Union may have one (1) representative designated for each school."

8 decision directed the parties to include as Article 10, "Union Management Meetings", a provision consisting of ten sections, including the following provision:[3]

> "Section 1. Local Level. The Parties agree that at the school level matters appropriate for discussion (personnel policies/practices and working conditions) are best resolved on an informal basis. To this end, the Parties agree that the Local Union Representative and the Principal, or his designated representative, shall meet and confer at reasonable times. Either the Local Union Representative or the Principal may require that there be formal meetings between the Principal and such administrator or administrators (but not to exceed three including the Principal) and the Local Union Representative and such other Union representative or representatives (but not to exceed three Union representatives including the Local Union Representative) once each month, provided, however, that not more than seven (7) such meetings shall be required during any school year."

Chairman Howlett's decision also contained the following statement under the caption "Reservation of Jurisdiction":

> "I reserve jurisdiction to determine any question which may arise on issues which I directed be included during the mediation process."

By letter to Chairman Howlett dated January 12, 1984, OFT President Ernest Lehmann, the Union's chief negotiator who was present throughout the negotiations, raised various questions in connection with Chairman Howlett's decision. Lehmann set out his questions under five categories, one being "Questions over issues resolved during mediation" and another, "Questions regarding issues directed as a result of arbitration." Under this latter category Lehmann, inter alia, indicated he assumed that "negotiations" between the Local Union Representative and the appropriate Principal was envisioned.

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[3] Chairman Howlett noted one unresolved dispute regarding the number of Regional meetings which should be held during the 1983-84 school year which had already begun. Accordingly, Howlett specifically reserved jurisdiction over this item in the event the parties could not reach agreement on the matter.

Thereafter the Union discussed its concerns with Respondent DODDS but was unable to reach agreement and on January 18, 1984 Lehmann wrote another letter to Chairman Howlett and explained the state of affairs. He further related that management was of the opinion that Chairman Howlett's decision should be implemented "as is" and any disagreements should be resolved by outside arbitration. Lehmann set forth his position that such a procedure would be costly and time consuming and suggested that since Chairman Howlett retained jurisdiction over any questions arising from his decision, it would be appropriate that he clarified his own decision. Accordingly, Lehmann requested a meeting involving one person from each party and Chairman Howlett to discuss the matter.

In his January 18 letter Lehmann also mentioned additional issues which surfaced: one dealing with Article 9, Section 4.a.; another involving a "clarification" of formal meetings in Article 10, Section 1; and, another concerning the format of Regional meetings referred to in another section of Article 10. With regard to formal meetings, Lehmann stated:

> ". . . It is our interpretation of Article 10, Section 1 that the phrase, 'formal meetings' connotes all the obligations and responsibilities that currently exist at the school level. This means that the following conditions must be met:
>
> "1. How often the meeting will be held
> "2. Who may attend these meetings
> "3. Official minutes of the meetings
>
> "It is clear from your Decision and Award that there will be seven required formal meetings and that there will be three team members. There is no mention of official minutes. Official minutes on the local level have existed for at least ten years. We ask you to clarify this." (Emphasis in the original).

No exceptions from Panel Chairman Howlett's December 8, 1983 decision were filed and the parties subsequently executed a collective bargaining agreement effective February 4, 1984 which contained, inter alia, the contract Articles directed for inclusion by Chairman Howlett, which included Article 10, Section 1, supra.

Sometime thereafter OFT President Lehmann, pursuant to Article 9, Section 1 of the contract, designated a Local Union Representative (LUR) for each school in the Mediterranean Region.[4] Some locations had both an Elementary School and a High School. At two of these locations the same person was named as LUR for both schools. However, at various other locations a different individual was named as the LUR for the Elementary School and the High School. At Zaragoza, Mabel Segovia, an Elementary School teacher, was designated the LUR for the Elementary School and Wallace Weir, a High School teacher, was designated LUR for the High School.[5]

On October 3, 1984 Zaragoza Elementary School Principal Antoinette Davino met with LUR Mabel Segovia, LUR Wallace Weir and Charlotte Cross, who was Local 1550 President and a teacher in the Zaragoza High School. This was the first Article 10 Elementary School formal meeting of the school year. Cross announced she would be the Chief Spokesperson for the Union and the parties proceeded to discuss ground rules for future meetings and other matters of concern to teachers in the Elementary School without any objection from Davino.[6]

On October 11, 1984 the first formal Labor-Management meeting for the Zaragoza High School was conducted. The

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[4] Respondent DODDS did not object to any of these designations.

[5] The Zaragoza Elementary School, with 28 teachers, is located in the same building as the High School which has 16 teachers.

[6] Cross was previously appointed Spokesperson by Local 1550's Executive Committee of which Segovia was a member. It was Cross' opinion that the Executive Committee would not have appointed her Spokesperson if Segovia had objected. The record contains no other relevant evidence bearing on Cross' appointment to this position.

High School Principal and the High School Assistant Principal represented management. The Union was represented by LUR Weir, Local 1550 Vice President Connie Kowalski and Local 1550 President Cross, the Local 1550 officers being present upon designation by LUR Weir. Cross announced she would be the Chief Spokesperson on behalf of the Union and the meeting progressed apparently without incident.[7]

Sometime between October 3 and November 7, 1984 Elementary School LUR Segovia and Elementary School Principal Davino had a discussion at which Davino told Segovia she had been considering the matter and although she wasn't sure, she didn't think she wanted anyone from the High School at the Elementary School Labor-Management meetings. Segovia later informed Local 1550 President Cross of this conversation.

The second formal Labor-Management meeting for the Elementary School was held on November 7, 1984. Present for management was Principal Davino and Robert Marble, Assistant Principal for both the Elementary School and the High School. Representing the Union was Cross, Segovia and Jim Ferguson, who was Local 1550 Treasurer and an Elementary School employee. Davino announced she would not discuss internal school matters at the meeting while anyone who was not on the Elementary School staff was present. Cross protested but Davino was adamant, contending her position was supported by the language of Article 10, Section 1 of the contract. Cross left and the meeting proceeded as scheduled.[8]

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[7] At the hearing examination with regard to this meeting was terminated upon objection by counsel for Respondent and his profession that management was not taking the position that it objects to employees within their own school acting as representatives for the Union for local Union-Management meetings.

[8] Davino testified that she did not object to Cross' presence at the October 3 meeting since that was the first meeting of the school year and she was not familiar with the terms of the contract at that time. Davino acknowledged on cross-examination that Article 10, Section 1 of the contract did not specifically state that the Union representatives, in addition to the LUR, who may attend these formal meetings were required to be from the school about which the meeting was concerned. However, Davino explained that she interpreted the caption "Local Level" in Section 1 of Article 10 to mean the particular school. Davino also acknowledged that she knew LUR Segovia wanted Cross to be present as one of the representatives at formal meetings being held for her school.

Later on November 7 Cross sent a note to Davino asking her to put in writing her refusal to discuss agenda items at the Labor-Management meetings if the ZFT President was the Union spokesperson or was in attendance. Davino replied in a letter to Cross on the following day denying Cross' request and stating that she (Davino) had to comply with Article 10, Section 1 of the contract, which she set forth, and further stating that Segovia was the LUR.

Sometime during the next few weeks Segovia met with Davino and asked her to reconsider her position of not permitting Cross to be present at formal Labor-Management meetings involving the Elementary School. According to Segovia, whose testimony is undenied:

> ". . . I went in to see her, and asked her to reconsider the position about allowing Charlotte (Cross) there. I expressed to her our concern for her not allowing us to have who we designated there from our labor side. I told her that also I was new in this position; I had never been LUR before; and I wanted Ms Cross there because she had experience in Labor-Management meetings, and that I didn't feel, you know, like I wanted right away to take over being Spokesperson.
>
> "I also expressed my concern about her saying that Ms Cross was there as a High School teacher. I said she was not: she was there just representing the local Union, and representing the teachers, per se, not representing High School teachers . . ."

Davino indicated she would consider Segovia's request and about a week later Davino indicated to Segovia that she was not going to change her position.[9]

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[9] Davino testified that sometime after the November meeting, supra, she sought advice on the matter from Regional Labor Relations staff and was told to stay with her decision because they also interpreted "Local Level" as the school.

On December 24, 1984 an unfair labor practice charge was filed by Local 1550, signed by Cross, reciting the following as the "Basis of the Charge":

> "On November 7, 1984, Dr. Beth Stephens, Director, DODDS, Dr. Jerald Bloom, director, DODDS-M and Ms Antoinette Davino did violate the statute by refusing to meet formally with the Federation if the Federation President is in attendance and acting as the chief spokesperson.
>
> "By these and other acts said officials did interfere with and/or coerce unit employees in their protected rights under the statute."

The next Labor-Management formal meeting involving the Zaragoza Elementary School occurred on February 6, 1985. Again Cross was present with LUR Segovia and Ferguson and again Davino refused to proceed with the meeting as long as Cross was in attendance. Cross left and the meeting proceeded as scheduled with Dale Nichols apparently substituting for Cross as a Union representative.10/

Although another formal Labor-Management meeting concerning the Zaragoza Elementary School was held on March 6, 1985, and indeed two more such meetings were held in May 1985, Cross testified she did not attempt to attend these sessions having concluded the attempt would be futile.11/

Meanwhile, on November 15, 1984, Panel Chairman Howlett met with OFT President Lehmann and Ronald Richards, Chief of Management-Employee Relations for DODDS Mediterranean.12/

10/ Cross testified that she did not pursue the matter with Davino in that she had filed an unfair labor practice charge regarding the November 7 incident and accordingly, further discussion would be an exercise in futility.

11/ Part of the reason Cross did not attempt to attend the March 6 meeting was because she was "not feeling well" on that day.

12/ Richards was management's chief negotiator during negotiations which gave rise to the party's 1984 contract and had been present at all negotiation sessions.

According to Richards,[13] the paramount issue over which most of the meeting was devoted concerned whether Article 10, Section 1 authorized the parties to "negotiate" at the Local level, management contending that "negotiations" could only occur at the level of recognition. Another matter in dispute at this meeting was whether the LUR for a particular school had to be an employee of that school as urged by Richards or as argued by Lehmann, whether the Union could select whomever it wished to act as LUR for a particular school. However, with regard to the selection of "such other Union representative or representatives" as set forth in Article 10, Section 1, cross-examination of Richards at the hearing by OFT President Lehmann reveals the following:

> "Q. You heard testimony about the letters that I wrote regarding this meeting. Could you point to any section of those letters that specifically deals with who and how the members of the local Union-Management meetings are selected - people who are representing the Union?
>
> "A. As I recall -- Getting down to those specifics - I don't believe we got to -- I think if you recall my testimony I didn't go into that. I don't think that very question ever was raised. It was not important.
>
> "Q. It was not raised?
>
> "A. No."

OFT President Lehmann also testified that during the November 15, 1984 meeting the question of how the Union selected the members of its Local teams for attendance at Article 10, Section 1 meetings never arose nor did the parties address the question of where such representatives would come from, or indeed whether such representatives had to even be employees.[14]

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[13] The account of what transpired at the November 15 meeting is taken primarily from Richards' credited testimony.

Discussion and Conclusions

The General Counsel essentially contends that Respondent violated sections 7116(a)(1), (5) and (8) of the Statute when it refused to recognize Charlotte Cross as the Union's designated representative during the formal meetings conducted on November 7, 1984, February 6, 1985 and March 6, 1985, supra. In its brief Respondent contends no violation of the Statute occurred by such conduct in that the Complaint procedurally lacks a valid unfair labor practice charge; Cross was not a representative of the OFT, the exclusive representative; Respondent fulfilled its Statutory obligations during the meetings since the Union had a representative present during the discussions which, Respondent suggests, is the extent of the Union's right; and even if the Union had a Statutory right to additional representatives at the meetings, any such right for a representative who was not an employee of the particular school under discussion was bargained away in negotiations covering Article 10, Section 1; and, in any event, any question concerning representational rights at such meetings concerns a matter of contract interpretation of Article 10, Section 1, and this matter is still within the jurisdiction of the arbitrator appointed by the Panel.[15]

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[14] Although Richards testified that during contract negotiations one of management's goals was to limit each school to representatives from that school, Richards also testified that Union President Lehmann consistently objected to this position. Richards further acknowledged that Article 10, Section 1 contains no clear and unmistakable language that the two Union representatives (other than the LUR) must come from the particular school. Indeed, although Richards at one point testified that the matter of the other two representatives was brought to the attention of Chairman Howlett on November 15, 1984, he nevertheless testified that the parties never came to a definite conclusion on this issue although Howlett did state his opinion ". . . that he felt that the Local Union Representative should come from the school."

[15] At the hearing counsel for Respondent also took the position that the Complaint should be dismissed since the

(footnote continued)

With regard to the procedural matter raised by Respondent, I reject Respondent's contention that the Complaint herein is defective due to the deviation between the unfair labor practice charge and the Complaint. The charge, signed by Cross on behalf of Local 1550, alleges Respondent violated the Statute ". . . by refusing to meet formally with the Federation if the Federation President is in attendance and acting as the chief spokesperson". The Complaint essentially alleges Respondent violated the Statute by failing and refusing to recognize Cross as a representative of the OFT, the exclusive representative. In my view the technical variance in language between the two documents was insignificant and created no confusion which disadvantaged Respondent in the litigation of this matter and the allegations of the Complaint were reasonably related to the allegations contained in the charge. In such circumstances no basis exists for dismissal of the Complaint. Cf. Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 19 FLRA No. 96, 19 FLRA No. 790 at 803 (1985) and Department of the Navy, Norfolk Naval Base, Norfolk, Virginia, 14 FLRA 731 at 744 (1984).

With regard to the substantive matters at issue herein, it is well settled under the Statute that the exclusive representative is entitled to be represented at formal discussions with management[16] and a union has the right to determine for itself who that representative will be.

(footnote 15 continued)

issue is barred from litigation by virtue of a prior grievance having been filed on the matter. It would appear that this defense has been abandoned. In any event, I find this contention unsupported by the record evidence.

[16] In its Answer to the Complaint Respondent admits that the meetings of November 7, 1984, February 6, 1985 and March 6, 1985 were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute, which provides:

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-

(footnote 16 continued)

Internal Revenue Service, Washington, D.C. and Fresno Service Center, Fresno, California, 16 FLRA 98 (1984) and American Federation of Government Employees, AFL-CIO and U.S. Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 4 FLRA 272 (1980). It is similarly well established that while a union may waive that right, any waiver of this Statutory right must be by conduct on the part of the union which is clear and unmistakable. Department of Health and Human Services, Food and Drug Administration, Region II, New York Regional Laboratory, 16 FLRA 182 (1984); and see Office of Program Operations Field Operations, Social Security Administration, San Francisco Region, 10 FLRA 172 (1982).

Article 10, Section 1 of the negotiated agreement provides, inter alia, that during formal meetings at the Local level, as herein, the Union may be represented by the LUR ". . . and such other Union representative or representatives (but not to exceed three Union representatives including the Local Union Representative). . ." Thus, while the Statute does not specifically limit the number of representatives a union may have at a formal discussion, by the terms of Article 10, Section 1 the Union herein specifically limited itself to the attendance of three Union representatives of whom one is the LUR. The LUR is specifically designated by the Union as such pursuant to Article 9, Section 3 of the agreement. However, neither the language of Article 10 nor any other portion of the collective bargaining agreement indicates how the other two representatives will be selected by the Union or restrict its choice of a Union representative. Nor in my view does the history surrounding the negotiations, including the meeting with Chairman Howlett on November 15, 1984, nor any past practice delineate who may serve in this capacity or clearly and unmistakably restrict the Union in its selection as to its Statutory choice of who will be a representative of the

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(footnote 16 continued)

> "(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment . . ."

Union. Accordingly, after the Union selected its LUR, the Union was free to exercise its Statutory right in selecting whomever it desired to act as the other Union representatives during these meetings.

Respondent contends further that Local 1550 President Cross was not a representative of the OFT, the exclusive representative. The record reveals that while Cross was not designated as the LUR for the Zaragoza Elementary School, she was selected by the Local 1550 Executive Committee to be a representative for the Elementary School at formal meetings and the acknowledged OFT representative, LUR Segovia, as a member of that Committee, did not object to that decision. Further, Cross presented herself at the formal meetings with management as a Union representative with LUR Segovia's knowledge and full consent. Indeed, Segovia clearly informed management that she wished Cross to be present at the meetings and represent the Union as its Spokesperson. In these circumstances and absent any evidence that the OFT had otherwise limited itself as to who would be a Union representative at Local level formal meetings, I find that when the OFT LUR designated Cross to be a Union representative for purposes of the Article 10 meetings, Cross became a Union representative of OFT. In addition, if Respondent actually doubted whether Cross was a designated representative of the OFT at these meetings it could have contacted OFT President Lehmann, which, of course, it never did.[17] Accordingly, I reject Respondent's contention that Cross was not a representative of OFT for the purpose of serving as a Union representative in formal meetings under Article 10, Section 1 of the negotiated agreement.

Next Respondent argues that the Union's only Statutory right was to have one representative at the meetings and management's meeting with the LUR fulfilled its obligation in this regard. I reject this argument. As stated above, the Statute does not delineate how many representatives a Union may have at a formal meeting and the Union only limited itself by contractual agreement to three representatives. Respondent DODDS' execution of the agreement recognized the extent of this limitation, which then became a matter binding on both parties in furtherance of their respective duty to bargain in good faith.[18]

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[17] It is immaterial that the OFT never issued a written document designating Cross as a Union representative. There is no evidence that Ferguson or Nichols were designated Union representatives in writing and yet Respondent interposed no objection to either of them acting as Union representatives in meetings with Davino, supra. Apparently only the LUR's received such written designations. Obviously then, the only real objection Respondent had to recognizing Cross as a Union representative was the fact that she was not on the Elementary School staff.

Respondent also contends that any question concerning representational rights at formal meetings under Article 10, Section 1 of the agreement concerns a matter of contract interpretation. I find no merit to this contention. To begin, in the circumstances herein I do not perceive the issue of who may serve as a Union representative other than the LUR under Article 10, Section 1 to be a matter involving differing but arguable interpretations of terms of the agreement. As found above, neither the specific language of Article 10, Section 1 nor the history of bargaining over this provision gives any support to Respondent's position that a Union representative at formal meetings must be an employee of a particular school. In my view the underlying issue herein concerns the question of whether a waiver of a Statutory right has occurred. To make that determination it is, of course, necessary to review and interpret the agreement and address the parties' arguments in support of their positions. However, that inquiry is made in order to ascertain whether a Statutory right has been waived and, as indicated above, this procedure is well established under numerous Authority decisions. On the other hand, an inquiry as to whether the matter at issue essentially involves differing but arguable interpretations of the agreement and the parties should be left to their agreed upon dispute resolution machinery, i.e. the grievance arbitration provision of their agreement, is not employed to determine whether a Statutory right has been waived. Rather, cases wherein the essence of the alleged unfair labor practice conduct involves differing but arguable interpretations of the agreement are limited to those situations wherein the union's right or the condition of employment at issue essentially arose through the collective bargaining agreement and the meaning of the contract must be resolved in order to ascertain whether that right or condition of employment actually exists. Such is not the case in the matter at issue herein where the existence of the Union's Statutory right is clear and the question is whether the Union engaged in conduct which limited that right. Cf. U.S. Customs Service, Region VIII, San Francisco, California, 18 FLRA No. 51, 18 FLRA 377 (1985) at 393-394; Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 16 FLRA 1083 (1984); United States Department of Labor, 16 FLRA 969 (1984); Department of Health and Human Services, Food and Drug Administration, Region II, New York Regional Laboratory, 16 FLRA 182 (1984); Social Security Administration, 15 FLRA 614 (1984); Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA 516 (1983); Iowa National Guard and Guard Bureau, 8 FLRA 500 (1982); Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA 307 (1982) at 322-323; Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C., 7 FLRA 665 (1982); U.S. Patent and Trademark Office, 3 FLRA 824 (1980) at 842-847; Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 3 FLRA 512 (1980); and Social Security Administration, District Offices in Denver, Pueblo and Greeley, Colorado, et. al., 3 FLRA 62 (1980).

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[18] Respondent's reliance on Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA No. 122 (1985) is misplaced. That case held, in relevant part, that the requirement in section 7114(a)(2)(A) of the Statute that an exclusive representative "be given an opportunity to be represented "at a formal discussion did not necessarily require advance notification to a union and the notice requirement would be satisfied if a union representative was in fact present at such a meeting. Thus, Veterans Administration applies only to a question of the adequacy of notice to a union which is not the issue herein.

With regard to the argument that Chairman Howlett retained jurisdiction over this matter, Respondent relies on the Reservation of Jurisdiction statement of Chairman Howlett in his "Arbitrator's Opinion and Decision" of December 8, 1983 wherein Chairman Howlett stated:

> "I reserve jurisdiction to determine any question which may arise on issues which I directed be included during the mediation process."

It is clear from the record that Chairman Howlett resolved the parties impasse in negotiations by two distinct processes: mediation and arbitration. Thus, certain provisions became part of the contract through the mediation process and other provisions were included in the agreement pursuant to Chairman Howlett's authority as interest arbitrator. Chairman Howlett's reservation of jurisdiction specifically extended only to issues he directed be included in the agreement during the mediation process. However, Article 10, Section 1 was a provision Chairman Howlett clearly directed be included during the arbitration process.[19] True, on January 18, 1984 OFT President Lehmann requested Chairman Howlett "clarify" certain matters related to Article 10, Section 1, suggesting Chairman Howlett retained jurisdiction over any questions arising from his decision. However, in my view this did not broaden Chairman Howlett's actual authority beyond matters he originally directed be included in the contract during the mediation process which did not include Article 10, Section 1 unless subsequently agreed to by the parties. Thus, when Chairman Howlett's November 15, 1984 mediation efforts did not specifically address or resolve the matter at issue herein, his jurisdiction over Article 10, Section 1 ceased. Accordingly, I find that Chairman Howlett, by virtue of the language contained in his Arbitrator's Decision and Opinion of December 8, 1983, did not reserve jurisdiction to determine the issue concerned herein and I reject Respondent's contention in this regard.[20]

In view of the entire foregoing[21] I conclude Respondent, by refusing to recognize Charlotte Cross as a Union representative during the meetings conducted on November 7, 1984, February 6, 1985 and March 6, 1985 has violated section 7116(a)(1), (5) and (8) of the Statute and recommend the Authority issue the following:

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[19] The only matter at issue during the arbitration process Chairman Howlett reserved jurisdiction over concerned Regional meetings during the then-current school year, as noted above.

[20] As indicated above, in order to waive a Statutory right, a waiver must be clear and unmistakable. The determination of whether such a waiver exists is the responsibility of the Authority. In my view, before a finding can be made that a party has waived the right to have the Authority make this determination such waiver must similarly be clear and unmistakable, which is certainly not the case herein.

[21] I have also considered various other related defenses and arguments raised by Respondent and find them to be without merit.

ORDER[22]

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Mediterranean Region (Madrid, Spain); and Zaragoza Elementary School (Zaragoza, Spain) shall:

1. Cease and desist from:

(a) Rejecting or failing to accept Charlotte Cross, or any other representative duly designated by the Overseas Federation of Teachers, AFT, AFL-CIO, the exclusive representative, as a Union representative for any Zaragoza School during formal meetings held pursuant to Article 10, Section 1 of the collective bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Accept and permit Charlotte Cross, or any other representative duly designated by the Overseas Federation of Teachers, AFT, AFL-CIO, to act as a Union representative for any Zaragoza School during formal meetings held pursuant to Article 10, Section 1 of the collective bargaining agreement.

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[22] With regard to the posting provisions of this Order, holiday and vacation periods are excluded from the required posting period due to the nature of teachers' work periods during the school year.

(b) Post at its school facilities in Zaragoza, Spain copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official, and shall be posted and maintained for 60 consecutive days thereafter, excluding holiday and vacation periods, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 19, 1986
Washington, D.C.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reject or fail to accept Charlotte Cross, or any other representative duly designated by the Overseas Federation of Teachers, AFT, AFL-CIO, the exclusive representative, as a Union representative for any Zaragoza School during formal meetings held pursuant to Article 10, Section 1 of the collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL accept and permit Charlotte Cross, or any other representative duly designated by the Overseas Federation of Teachers, AFT, AFL-CIO, to act as a Union representative for any Zaragoza School during formal meetings held pursuant to Article 10, Section 1 of the collective bargaining agreement.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

[1-CA-50238]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS,
MEDITERRANEAN REGION
(Madrid, Spain); and ROTA
ELEMENTARY SCHOOL (Rota,
Spain)

Respondent

and

Case No. 1-CA-50238

ROTA FEDERATION OF TEACHERS
a/w OVERSEAS FEDERATION OF
TEACHERS, AFT, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 20, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., July 29, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS,
MEDITERRANEAN REGION
(Madrid, Spain); and ROTA
ELEMENTARY SCHOOL (Rota,
Spain)

Respondent

and

Case No.: 1-CA-50238

ROTA FEDERATION OF TEACHERS,
a/w OVERSEAS FEDERATION OF
TEACHERS, AFT, AFL-CIO

Charging Party

. . . .

Joseph Caneva, Esq.
For the Respondent

Ernest J. Lehmann
For the Charging Party

Peter F. Dow, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the Rota Federation of Teachers, a/w Overseas Federation of Teachers, AFT, AFL-CIO (herein the Rota Federation) against the above captioned Respondent, the General Counsel of the Authority, by the Regional Director for Region I, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) and (5) of the Statute by failing and refusing to recognize Charles Barham as a designated Union representative of the exclusive representative for a grievance filed by a bargaining unit employee.

A hearing on the Complaint was conducted in Rota, Spain at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by counsel for Respondent and counsel for the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein the Overseas Federation of Teachers, AFT, AFL-CIO (herein sometimes the Union or OFT) has been the exclusive collective bargaining representative of various employees of the Department of Defense Dependents Schools, Mediterranean Region (herein Respondent DODDS) including teachers and other professional employees at the Elementary School located in Rota, Spain. The Rota Federation is a constituent body of the Union.

Respondent DODDS and the Union entered into a collective bargaining agreement covering unit employees on February 4, 1984. Article 9, Section 3 of that agreement provides:

> "Section 3. Recognition of Representatives. The Employer agrees to recognize the elected officers and duly designated representatives of the Union. The Union shall notify the principals of individual schools in writing of its representatives and any changes thereto. The Union will provide the Employer with a complete listing of representatives by school as soon as possible after the beginning of each school year.
>
> > "a. The Union may have one (1) representative designated for each school.
> >
> > "b. The Union will designate one (1) representative for the Regional level. Said representative will be

> the point of contact for all representational matters within the Region. The Regional Union Representative may designate another person to act in his/her behalf."1/

When the agreement was first put into effect, Article 31, Section 9 provided:

> "Section 9. Representation. Employees are authorized representation when meeting with any administrator or supervisor at any step of the grievance procedure and may be represented by the Union, a representative designated by the employee or represent themselves."

After the agreement was executed the parties concluded that Article 31, Section 9 was not in compliance with the state of the law on the matter of representation by any designated representative. Accordingly, the parties entered into renegotiations on this subject in November 1984. The Union was also concerned with what would happen in a situation where the Local Union Representative, as designated under Article 9, Section 3 above, was the employee who had the grievance, e.g., could they select someone else or would they have to represent themselves. Thereafter, management submitted the following proposal as Article 31, Section 9:

> "Employees are authorized representation when meeting with any administrator or supervisor at any step of the negotiated grievance procedure. If an employee elects not to represent him/herself, he/she may only be represented by the local union representative. If the local union representative is the grievant, he/she may be represented by the local union representative from an adjacent

---

1/ There was no evidence presented as to what was said by the parties during the negotiation of Article 9, Section 3. However, with regard to Section 3a., Respondent DODDS' chief negotiator testified that it was management's intent that there would be only one Local Union Representative (LUR) at each school to handle all representational matters so the school Principal would have only one "point of contact."

> school. In isolated schools, the local union representative may designate an acting local union representative for the grievance only."

According to the testimony of Respondent DODDS' chief negotiator, during renegotiations the Union took the position it wanted employees to be able to choose anyone they wanted to represent them during a grievance as long as approved by the Union. Management felt this was more than what they intended and the parties "compromised" by "paraphrasing the language required by the Statute.[2/] However, notes of the negotiation session taken by a management representative state:

> "Union says its proposal means a LUR could appoint other union reps. to do grievances etc., thus more than one rep. in a school at a given time. Mgmt. pointed out that this would violate Article 9, Section 3a. Mgmt. gave the Union its first counter proposal. Mgmt.

[2/] Section 7121(b)(3) of the Statute provides, in relevant part:

> "(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall. . .
>
> "(3) include procedures that -
>
> "(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
>
> "(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding. . ."

> explains that this language does nothing more than as stated in the Statute. An employee can only have a union representative or represent himself thus a paraphrase of the Statute. Mgmt. and Union modified proposal to produce a paraphrase of the Statute to act as a notice to employees of their rep. rights under the Statute. Parties signed off on Agreement Article 31. . ."

Accordingly, on February 14, 1985 the parties agreed to the following language for Article 31, Section 9:

> "Section 9. Representation. Employees are authorized representation when meeting with any administrator or supervisor at any step of the negotiated grievance procedure. If an employee elects not to represent him/herself, he/she may only be represented by the union."

With regard to the sentence "If an employee elects not to represent him/herself, he/she may only be represented by the Union," above, management's chief negotiator, the only witness to testify about these negotiations, testified under cross-examination:

> ". . . our intent . . . as I recall it the intent of that language was to limit it to the Local Union Representative because our understanding was that only the employee or the local Union could represent him in a grievance matter.
>
> "Q. But the Union didn't agree with that. Right?
>
> "A. Obviously not. They didn't like the language, so we compromised on something else.
>
> "Q. Compromised on the word "Union". So then, Mr Richards, there is no place in the Collective Bargaining Agreement that specifically says - now, specifically says, that the employee in the grievance procedure may only be represented by the Local Union Representative, is there?

> "A. I believe there is. I believe when you read this Section in conjunction with Article 9, there is a limitation to the Local Union Representative.
>
> Q. So that is your interpretation?
>
> A. Yes."

Meanwhile on January 28, 1985 at the Rota, Spain Elementary School, Lee Hunt, a teacher and President of the Rota Federation, filed a grievance concerning a merit promotion rating he received. Hunt wished to have Charles Barham as his representative for the grievance. Barham was also a teacher at the Rota Elementary School and a Union member. Hunt discussed the matter with Helen Ann Gay who the Union had previously appointed the Rota Elementary School LUR under Article 9, Section 3 of the agreement. Gay told Hunt she had received word from Respondent DODDS' Regional Labor Relations Branch that a teacher could no longer represent another teacher in a grievance and such representation was being restricted to the LUR. Apparently not satisfied with Respondent DODDS' interpretation, on February 7, 1985 Hunt and Gay each sent a letter to the Rota Elementary School Assistant Principal, Manuel Ortega. Hunt's letter stated:

> "Under Article 31, Section 9 of the Collective Bargaining Agreement between DODDS-M and the OFT, I authorize Charles Barham to represent me in a grievance matter with you having to do with my Merit Promotion papers and Article 9, Section 2 of the Agreement."

Gay's letter, signed as LUR, read:

> "This is to inform you that I am designating Charles Barham to represent me in all matters before you pertaining to Lee Hunt's Merit Promotion papers and the grievance matter he now has pending before you."

Ortega responded to Hunt on February 8, 1985 indicating that, in accordance with the negotiated agreement, he could only accept the named LUR as the grievant's representative. Hunt was thereafter represented by Gay in his grievance which was subsequently rejected as untimely.

Discussion and Conclusions

Counsel for the General Counsel contends that Barham was the Union's designated representative in a contractual grievance matter and Respondent violated section 7116(a)(1) and (5) of the Statute when it refused to recognize him as such since the Union never waived its right to designate its representative for this purpose. Counsel for Respondent essentially takes the position that no violation of the Statute has been established contending Article 9, Section 3a. limits the number of Union representatives which the OFT may designate at a school to one; Helen Ann Gay, the LUR, was that representative at the Rota Elementary School and accordingly was the only Union representative Respondent was obligated to recognize; and therefore, Barham could not have been legitimately designated as a Union representative as long as Gay continued in her representational capacity, which she did.

It is well settled that it is within the discretion of the exclusive representative to designate its representatives when fulfilling its responsibilities under the Statute. Department of Health and Human Services, Food and Drug Administration, Region II, New York Regional Laboratory, 16 FLRA 182 (1984); Internal Revenue Service, Washington, D.C. and Fresno Service Center, Fresno, California, 16 FLRA 98 (1984); and American Federation of Government Employees, AFL-CIO and U.S. Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 4 FLRA 272 (1980). It is similarly well established that while a union may waive that right, any waiver of this Statutory right must be by conduct on the part of the union which is clear and unmistakable. Department of Defense, Department of the Army Headquarters, XVIII Airborne Corps, and Fort Bragg, 15 FLRA 790 (1984); and see Department of Health and Human Services, Food and Drug Administration, supra, and Office of Program Operations Field Operations, Social Security Administration, San Francisco Region, 10 FLRA 172 (1982).

While accepting the general principles recited herein, Respondent nevertheless essentially contends that by executing Article 9, Section 3a. of the agreement the Union has agreed to limit the number of Union representatives it may have at the Rota Elementary School. Thus, according to Respondent, the Union waived its right to have more than one Union representative at the Rota Elementary School and since Helen Ann Gay remained the LUR, Respondent could refuse to recognize any other individual as a Union representative without violating the Statute. A corollary of this argument is that only Gay could act as Union representative when representing any employee during a grievance at Rota Elementary.

I reject Respondent's contentions. True OFT designated Gay to be its representative at Rota Elementary. However, nothing in the collective bargaining agreement or history of negotiations specifies, defines or limits Gay's authority as LUR. Indeed, testimony reveals that during renegotiations of Article 31, section 9 of the agreement dealing with grievance representation, Respondent sought to have language inserted in the agreement which would limit the authority of the LUR to appoint another employee to act as a Union representative for grievance purposes and the Union clearly refused to accept such language or contract interpretation. Management was obviously aware that it could not adhere to impasse its desire to have the Union accede to its position limiting the function and authority of the LUR since the matter constitutes a permissive and not mandatory subject of bargaining. Department of Transportation, Federal Aviation Administration, San Diego, California, 15 FLRA 407 (1984) and American Federation of Government Employees, AFL-CIO, supra. Rather, management was satisfied during the renegotiation process to leave vague this issue and essentially rely on an inference flowing from Article 9, Section 3a. In such circumstances I do not conclude that Respondent has established the Union clearly and unmistakably waived its Statutory right to restrict or, as here, determine the breath of authority of its acknowledged Union representative to delegate responsibility by appointing another individual as a Union representative for grievance representation purposes. See Department of Health and Human Services, Food and Drug Administration, supra, and Department of Defense, Department of the Army Headquarters, supra. Thus, I conclude that as the duly designated OFT representative at the Rota Elementary School, LUR Gay was not limited in her authority to designate another individual to represent a Rota Elementary employee in a grievance as an OFT representative.

Respondent suggest that the designation of an individual other than the LUR to represent a grievant at Rota Elementary was, if effect, allowing an employee to choose a grievance representative which met the "approval" of the Union while that representative was actually not the Union's representative since LUR Gay continued in that capacity. Such conduct would be contrary to the Authority's holding in National Federation of Federal Employees, Local 1001 and Department of the Air Force, Vandenberg Air Force Base, California, 15 FLRA 804 (1984). However, such was not the case herein. Although the testimony indicates that during the renegotiation of Article 31, Section 9 the Union wanted employees to be able to choose anyone they wanted to represent them as long as this choice met the approval of the Union, management's notes and testimony concerning the negotiations also indicate that the Union also took the position that the LUR could appoint others to act as Union representatives for grievances. Further, LUR Gay's letter of February 7, 1985 to the Rota Elementary Assistant Principal stated that in the Lee Hunt grievance, Charles Barham was designated to represent her. Clearly then, LUR Gay appointed Barham to act as a Union representative for this grievance and his actions were binding upon the Union. Accordingly, Barham was not simply "approved" by the Union as a personal representative of Hunt.

To the extent Respondent maintains that the dispute herein solely concerns a matter of contract interpretation and is appropriate for resolution only through the grievance machinery, this argument is also rejected. In my view the underlying issue herein concerns the question of whether a waiver of a Statutory right has occurred. To make that determination it is, of course, necessary to review and interpret the agreement and address the parties' arguments in support of their positions. However, that inquiry is made in order to ascertain whether a Statutory right has been waived and, as indicated above, this procedure is well established under numerous Authority decisions. On the other hand, an inquiry as to whether the matter at issue essentially involves differing but arguable interpretations of the agreement and the parties should be left to their agreed upon dispute resolution machinery, i.e. the grievance-arbitration provision of their agreement, is not employed to determine whether a Statutory right has been waived. Rather, cases wherein the essence of the alleged unfair labor practice conduct involves differing but arguable interpretations of the agreement are limited to those situations wherein the union's right or the condition of employment at issue essentially arose through the collective bargaining agreement and the meaning of the contract must be resolved in order to ascertain whether that right or condition of employment actually exists. Such is not the case in the matter at issue herein where the existence of the Union's Statutory right is clear and the question is whether the Union engaged in conduct which limited that right. Cf. U.S. Customs Service, Region VIII, San Francisco, California, 18 FLRA No. 51, 18 FLRA 377 (1985) at 393-394; Defense Logistics Agency, Defense Depot Tracy,

Tracy, California, 16 FLRA 1083 (1984); *United States Department of Labor*, 16 FLRA 969 (1984); *Department of Health and Human Services, Food and Drug Administration, Region II, New York Regional Laboratory*, 16 FLRA 182 (1984); *Social Security Administration*, 15 FLRA 614 (1984); *Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri*, 11 FLRA 516 (1983); *Iowa National Guard and National Guard Bureau*, 8 FLRA 500 (1982); *Division of Military and Naval Affairs, State of New York, Albany, New York*, 8 FLRA 307 (1982) at 322-323; *Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C.*, 7 FLRA 665 (1982); *U.S. Patent and Trademark Office*, 3 FLRA 824 (1980) at 842-847; *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 3 FLRA 512 (1980); *and Social Security Administration, District Offices in Denver, Pueblo and Greeley, Colorado*, *et al.*, 3 FLRA 62 (1980).

In view of the enter foregoing I conclude Respondent, by failing and refusing to recognize Charles Barham as the designated Union representative of the exclusive collective bargaining representative for the grievance filed by bargaining unit employee Lee Hunt, violated section 7116(a)(1) and (5) of the Statute and I recommend the Authority issue the following:

ORDER[3]

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of Defense Dependents Schools, Mediterranean Region (Madrid, Spain), and the Rota Elementary School (Rota, Spain) shall:

1. Cease and desist from:

    (a) Failing and refusing to recognize Charles Barham, or any other individual duly designated by the Local Union Representative, as the designated Union representative of the Overseas Federation of Teachers, AFT, AFL-CIO, the exclusive collective bargaining representative, as the Union representative for the grievance filed by unit employee Lee Hunt, or any other unit employee at the Rota Elementary School.

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[3] With regard to the posting provisions of this Order, holiday and vacation periods are excluded from the required posting period due to the nature of teachers' work periods during the school year.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Recognize Charles Barham, or any other individual duly designated by the Local Union Representative, as the designated Union representative of the Overseas Federation of Teachers, AFL, AFL-CIO, the exclusive collective bargaining representative, as the Union representative for the grievance filed by unit employee Lee Hunt, or any other unit employee at the Rota Elementary School.

(b) Post at its school facilities in Rota, Spain Spain copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official, and shall be posted and maintained for 60 consecutive days thereafter, excluding holiday and vacation periods, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 20, 1986
Washington, D.C.

[1-CA-50238]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to recognize Charles Barham, or any other individual duly designated by the Local Union Representative, as the designated Union representative of the Overseas Federation of Teachers, AFT, AFL-CIO, the exclusive collective bargaining representative, as the Union representative for the grievance filed by unit employee Lee Hunt, or any other unit employee at the Rota Elementary School.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL recognize Charles Barham, or any other individual duly designated by the Local Union Representative, as the designated Union representative of the Overseas Federation of Teachers, AFT, AFL-CIO, the exclusive collective bargaining representative, for the grievance filed by unit employee Lee Hunt, or any other unit employee at the Rota Elementary School.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

[7-CA-50627]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
ODGEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

Case No. 7-CA-50627

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1592, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on July 3, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 11, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20024

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1592, AFL-CIO

Charging Party

Case No. 7-CA-50627

Clare A. Jones, Esq.
For the Respondent

Michael Farley, Esq.
Joseph Swerdzewski, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on November 27, 1985 by the Regional Director for the Federal Labor Relations Authority, Region VII, a hearing was held before the undersigned on January 17, 1986 at Ogden, Utah.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, et seq. (herein called the Statute). It is based on a first amended charge filed on November 13, 1985 by American Federation of

Government Employees, Local 1592, AFL-CIO (herein called the Union) against Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah (herein called the Respondent).

The Complaint alleged, in substance, that on or about September 26, 1985 William Burton, a supervisor and/or management official of Respondent, stated to a unit employee that he was going to charge said employee with insubordination because the employee had sought the assistance of the Union and had filed a grievance. By reason of the foregoing, Respondent allegedly violated Section 7116(a)(1) of the Statute.

Respondent's Answer, dated December 18, 1985, denied the aforesaid allegation as well as the commission of any unfair labor practices.

Both parties were represented at the hearing. Each was afforded full opportunity to be heard to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.1/

Upon the entire record herein, from my observations of the witnesses and their demeanor and from all of the testimony and evidence adduced at the hearing, I make the following finding and conclusions:

Findings of Fact and Conclusions

1. At all times material herein the American Federation of Government Employees, AFL-CIO (AFGE) has been the exclusive representative of a nationwide bargaining unit of employees who are employed by Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, including all non-supervisory and non-professional employees of Respondent with specified exclusions.

2. At all times material herein, the American Federation of Government Employees, AFL-CIO Council 214 (Council) has been an affiliate and agent of AFGE, the exclusive representative of the employees herein above set forth.

1/ Subsequent to the hearing General Counsel filed a Motion to Correct the Transcript. No objections having been filed thereto, and it appearing that the proposed corrections are proper, the Motion is granted as requested.

3. At all times material herein the Union has been an affiliate and agent of the Council and of AFGE.

4. On September 9, 1985[2] Joseph J. Celli, who was chief steward for the Union as well as an employee of Respondent, returned a telephone call he received from Lew Bargar, a unit employee. The call was answered by William Burton who was Bargar's first level supervisor. Celli asked to speak to Bargar. After an exchange of words[3] between them the Union representative was permitted to talk with Bargar who informed Celli that he wanted to file a grievance.

5. On September 10 Celli was released from duty to assist Bargar in preparing a grievance. This grievance, (GC Exhibit 3), protested Burton's denying Bargar's leave to appear in court for personal reasons and placing the employee on AWOL for not coming to work.

6. On September 26 Celli assisted Bargar to prepare another grievance. This grievance, (G.C. Exhibit 2), protested Burton's denying Bargar emergency annual leave to file a police report concerning a theft of the employee's car. It arose as a result of an earlier incident when a doctor from Humana Hospital called supervisor Steve Romero and said he wanted to give a message to employee Vega. Since Bargar was the only one who knew where to reach Vega, the supervisor asked Burton if Bargar used leave 15 minutes before lunch (11:45 A.M.) and tell Vega to contact the doctor. Burton agreed but told Bargar to report straight

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[2] Unless otherwise indicated, all dates hereinafter mentioned occur in 1985.

[3] Celli testified that Burton, upon answering the phone, inquired "is this son of a bitch talking union business with you on the phone?" Further, that Celli replied he just had a message to call Bargar. Burton testified he told Celli, upon answering the phone, that Celli was supposed to go through his supervisor instead of reaching Bargar via the phone. It is not clear to the undersigned, even accepting Celli's version of this colloquy, that Burton registered annoyance at the call because it involved Union intervention. In any event, I find it unnecessary to resolve credibility as to this exchange since it is not probative as to the alleged threat made on September 26 -- the alleged violation herein.

back -- to do no more playing and chasing around. Bargar did not return as directed at 12:30 P.M., which is the end of his lunch hour, but he called Burton and asked for the remainder of the day off. Burton refused and said Bargar had no more leave. Ten minutes later Bargar called to have Burton speak with the desk sergeant at the Police Department where the employee had gone to report his car was stolen. The supervisor refused to do so, and he ordered Bargar to return immediately or else the employee would be put on AWOL. Bargar did not return that day and Burton gave him 3 hours AWOL.

7. After the September 26 grievance was prepared both Celli and Bargar met that day with Burton to discuss both grievances. They met in another supervisor's office. Celli gave Burton the September 26 grievance form and asked the supervisor to sign the form, indicating the matter had not been resolved. Burton refused, saying it was a lie and he wouldn't resolve the problem.[4] Whereupon Celli telephoned Gary Higgs, Respondent's Labor Relations Specialist, and told him that Burton wouldn't sign the grievance form. Higgs spoke to Burton and advised him to sign. The supervisor then signed the grievance.

8. At the meeting on September 26, and after Burton signed the grievance form dated September 26, Celli presented the September 10 grievance to the supervisor for his signature. Burton read it and refused to sign as requested.

9. Celli testified that after Burton read the September 10 grievance he said to Bargar, "I am going to write you up for insubordination for bringing the damned union over here and writing this pack of lies, I was going to let you slide but I am not going to now." Further, that Burton said to Celli, "When he called me and I directed him to return to work and he didn't, I can write him up for insubordination, can't I?" Burton continued, saying, "Never mind, I will talk to Wayne Everly."[5]

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[4] This meeting was Burton's first grievance meeting as a supervisor. Burton testified he called the statements a lie because he knew Bargar's car was stolen 2-3 days earlier and before Bargar reported the theft.

[5] Everly is Respondent's Employee Relations Specialist.

Burton testified he did refuse to sign the grievance form as requested on September 26 because the statements by Bargar were not true. He admits to possibly calling the allegations "damned lies." Burton also testified that at the September 26 meeting he said to Bargar, "Lew, it could have been a lot worse because I gave you a direct order to report back to work immediately and you did not. You told me that you were not coming, to go ahead and put you on AWOL if you want to. But I am not coming."[6] Burton further testified that is all he stated about insubordination; that he did not say he would charge Bargar with insubordination for bringing the union into the matter.

The two versions of what was said by Burton on September 26 at the meeting present a clear issue of credibility. The undersigned was impressed with, and credits Burton's version of what he stated to Bargar re writing Bargar up for insubordination.[7] Nothing in the record supports a finding of union animus in the part of the supervisor, nor does it appear that Burton interfered with the Union's representation of Bargar or any other employee. Contrariwise, the record reflects that the supervisor arranged for Celli to confer with Bargar and acceded to the meeting with the union official on September 26. The undersigned deems the version as related by Celli to be implausible in light of the circumstances, including the fact that no charge of insubordination was ever placed against Bargar. I find and conclude Burton did not threaten or state on September 26 he would charge Bargar with insubordination for bringing the Union into the matter.

In sum, I find and include that General Counsel has failed to prove by a preponderance of the evidence that Respondent's agent, William Burton, threatened employee Lew Bargar on September 26, 1985 to charge him with insubordination for seeking the assistance of the Union and filing a grievance.

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[6] Burton also testified he told Bargar that therefore he would put the employee on AWOL.

[7] It may not be proper to draw an adverse inference from the failure of Bargar to testify since he is no longer employed by Respondent. Nevertheless, it is noted that no explanation was offered by General Counsel for Bargar's non-appearance. Moreover, the record indicates General Counsel objected, on cross-examination of Celli, when a question was posed as to whether Bargar told the witness why he would not be at this hearing.

In view of that determination I conclude Respondent has not violated Section 7116(a)(1) of the Statute as alleged. Accordingly, it is recommended the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. 7-CA-50627 be, the same hereby is dismissed in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: July 3, 1986
Washington, D.C.

[7-CA-50446]

[7-CA-50446]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
ODGEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 7-CA-50446

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1592, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on July 8, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 22, 1986

Jerome P. Hardiman
for Harold D. Kessler
Director of Case Management

[7-CA-50446]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1592, AFL-CIO

Charging Party

Case No. 7-CA-50446

Clare Jones, Esquire
For the Respondent

Matthew Jarvinen, Esquire
Joseph Swerdzewski, Esquire
For the General Counsel, FLRA

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

It was alleged in the complaint that on or about May 13, 1985, the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah (Respondent), through Steve Romero, General Equipment Examiner Foreman, Central Material Receiving Section A, Directorate of Distribution, an agent of Respondent, told a unit employee that a telephone line had been disconnected in the Local Purchase Cage because unit employees were using the line to call the Union. It was alleged that the conduct outlined was violative of Section 7116(a)(1) of the Statute.

Counsel representing the General Counsel seeks a cease and desist order, assurance by Respondent to the Union and employees of their rights to contact the Union, and the posting of an appropriate notice.

The Respondent argues in defense that (1) the statement alleged to have been made by Mr. Romero was not made, and (2) that should it be found that the alleged statement was, in fact, made by Mr. Romero, that statement was simply the expression of a personal opinion on the part of Mr. Romero, and considering the relationship of the parties, the confidentiality of the expression, the invitation for the expression by the inquiring employee, that expression did not constitute interference with any statutorily protected right.

The Respondent and the General Counsel were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including exhibits and other relevant evidence adduced at the hearing[1] and briefs filed by counsel representing the Respondent and General Counsel, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

During April 1985 Valeen Trujillo, a Union steward, and Beth Frisbey, an ex-Union steward, both unit employees in the Local Purchase Cage Unit of A Section, Central Material Receiving, Directorate of Distribution, Ogden Air Logistics Center, met with a Union representative in their work area on official time in connection with representational matters. Their immediate supervisor, Steve Romero, was aware of this contact. The Section chief, Jerry F. Derrick, was also aware of the Union representative's contact with Beth Frisbey.

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[1] Counsel representing the General Counsel moved to correct errors in the hearing transcript. The motion was unopposed. Under authority contained in 5 C.F.R. § 2423.19(r), the proposed corrections are approved.

On or about May 8, 1985, a telephone line was removed from the Local Purchase Cage Unit. The decision to remove the line was made by Section chief Jerry F. Derrick. The line was not necessary for the performance of duties by employees in the Local Purchase Cage.[2] Furthermore, Mr. Derrick had received continuing complaints from the supervisor and employees of the Dear John Bay, a high priority function, that they were unable to perform their work because employees in the Local Purchase Cage were tying up the phone. Derrick had instructed Steve Romero, foreman of the Local Purchase Cage, to speak with his employees about using the line. Derrick made the decision to remove the telephone when complaints of tying up the line persisted.

Shortly after the telephone was removed, Ned Palmer, an employee in the Local Purchase Cage, asked his immediate supervisor and close friend, Steve Romero, the reason why the telephone was removed. According to Palmer, Romero replied, "The phone was to be used in the Dear John Bay because they [have] a higher priority. Between you and me, there [are] two people in the cage using the telephone to call the Union and also abusing the line." Romero, whose testimony I credit, testified that he did not attribute the removal to two employees using the line to call the Union, but instead replied, "Ned, as I told you before on your safety meetings and other meetings, that phone line is being abused, too many personal calls and the phone is being tied up too many times. My supervisor has been cautioning me about tying up that line and we had to do something about it. In fact, my supervisor is not the only one complaining. Employees from the Dear John Bay are complaining. ,Remember, Ned, we had an incident here a while back when Mr. Gallagos was out yelling at the top of his voice for Trujillo about the use of the phone?"[3]

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[2] The General Counsel made an effort to show through the testimony of Ned Palmer that the telephone was necessary for the performance of duties. However, I credit the contrary detailed and persuasive testimony of Jerry Derrick and Steve Romero in this regard.

[3] The Gallagos-Trujillo incident involved Willie Gallagos, an employee of the Dear John Bay, yelling at the top of his voice at Valeen Trujillo, a Union steward and unit employee in the Local Purchase Cage. Gallagos yelled

(continued)

READEX FICHE best copy available

Discussion and Conclusions

Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Based on the credibility resolutions made above, it is concluded that the alleged statement was not made, and that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1), as alleged. Accordingly, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29:

ORDER

IT IS HEREBY ORDERED, that the Complaint in Case No. 7-CA-50446, be, and hereby is, dismissed.

LOUIS SCALZO
Administrative Law Judge

Dated: July 8, 1986
Washington, D.C.

3/ (continued)

that he could not get any business done with Trujillo tying up the line. He told her to get off the line and remarked, "I don't have time for you to be conducting your business through Union, or whatever in order to get my phone call done." The incident was testified to by Steve Romero and *corroborated, in part, by the testimony of Jerry F. Derrick.*

9-3/63

Federal Labor Relations Authority

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ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

NUMBER 63

September 30, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 4-CA-60147 (September.11, 1986)

Department of Defense Department of the Navy Charleston Naval Shipyard Charleston, South Carolina and Federal Employees Metal Trades Council of Charleston, AFL-CIO

Case No. 7-CA-50347 (September 15, 1986)

Internal Revenue Service Ogden Service Center Ogden, Utah and National Treasury Employee Union, Washington, D.C.

Case No. 6-CA-60050 (September 23, 1986)

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, and Social Security Administration, Albuquerque Data Operations Center, Albuquerque, New Mexico

Case No. 9-CA-60082 (September 29, 1986)

General Services Administration Washington, D.C. and General Services Administration Auburn, Washington and American Federation of Government Employees, Council 236, AFL-CIO

Case No. 7-CA-50580 (September 30, 1986)

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, Local 1592, AFL-CIO

***This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.**

Y 3.F 31/21-3:

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE NAVY
CHARLESTON NAVAL SHIPYARD
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. 4-CA-60147

FEDERAL EMPLOYEES METAL
TRADES COUNCIL OF
CHARLESTON, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on July 30, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., September 11, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[4-CA-60147]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE NAVY
CHARLESTON NAVAL SHIPYARD
CHARLESTON, SOUTH CAROLINA

Respondent

and

FEDERAL EMPLOYEES METAL
TRADES COUNCIL OF CHARLESTON,
AFL-CIO

Charging Party

Case No.: 4-CA-60147

Mr. Donald M. Wilson
For the Charging Party

Pamela B. Jackson, Esquire
For the General Counsel

Ms. Delores T. Griffin
Ms. Shelly S. Dandridge
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, et. seq.,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, et seq., concerns the addition of a critical performance element, with respect to Occupational Safety and Health, to the performance appraisals of certain shop employees.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(5) will be referred to, simply, as "§16(a)(5)."

This case was initiated by a charge filed on December 11, 1985 (G.C. Exh. 1(a)) which alleged violations of §§16(a)(1), (5) and (8); §14(a)(1); and §6(b)(2) and (3). The Complaint and Notice of Hearing issued on March 6, 1986, alleged violations of §§16(a)(1) and (5), and fixed the hearing for April 10, 1986, pursuant to which a hearing was duly held on April 10, 1986, in Charleston, South Carolina before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues presented, to examine and cross-examine witnesses, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, May 10, 1986, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on May 13, 1986, which have been carefully considered. Upon the basis of the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The Federal Employees Metal Trades Council of Charleston, AFL-CIO (hereinafter referred to as the "Union"),

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[2] Each party filed a Motion To Correct Transcript which are hereby granted except as noted and the transcript is hereby corrected as follows:

Page	Line	From	To
11	4	heir	aware
11	4	to the	through
14	12		add "not" after "has"
26	9	and	on
32	3	denied	
32	3	your	my
66	19	argument	negotiations
95	14	under	over
96	4	are	of
06	18	hadn't	had
23	4	Clark	Bart

READEX FICHE best copy available

is the representative of certain employees of Respondent, as more fully set forth in Article I, Section 2 of the Agreement of the parties (Jt. Exh. 1).[3] There are about 5500 employees in the Union's bargaining unit (Tr. 87).

2. Performance appraisals of bargaining unit employees are governed by CNSYDINST 12430.6C CH-3, dated March 8, 1985 (G.C. Exh. 6), which, of course had been preceded by like issuances (See, e.g., G.C. Exh. 7, December 15, 1982). Prior to issuance of CNSYDINST 12430.6C CH-3, the Union was given notice and its then President, Mr. Ernest V. Myers, Jr., and then Recording Secretary, Mr. J. Davidson, met with Mr. Stephen C. Scott, now Deputy Director of Industrial Relations and then head of the Employee Relations Division, to discuss the proposed revision to CNSYDINST 12430.6C (Tr. 98-99; Agency Exh. 4). Mr. Myers discussed several points but declined to submit any written proposals on the proposed change[4] (Tr. 99).

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[3] A new Agreement was negotiated in 1985. Negotiations began on March 5, 1985; negotiations were completed October 23, 1985 (Tr. 118); however, the Secretary of the Navy did not approve the Agreement until March 27, 1986; and by agreement the new contract was not to become effective until May 4, 1986 (Tr. 116).

[4] Agency Exhibit 5 must not be confused with CNSYDINST 12430.6C CH-3 or with the meeting of February 7, 1985. Agency Exhibit 5, dated January 21, 1985, is a memorandum from the Director, Occupational Safety and Health, recommending that Occupational Safety and Health be made a critical element of existing performance appraisal programs. From its date, January 21, 1985, and the date of the consultation between, inter alia, Messrs. Myers, Davidson and Scott on February 7, 1985, it might appear that the Union had been given notice of Agency Exhibit 5 as well as the proposed revision of CNSYDINST 12430.6C, and, had this been true, the Union may very well have waived its right to negotiate impact and implementation by its failure to request negotiations. But this was not true. Respondent did not give the Union notice of Agency Exhibit 5; and Agency Exhibit 5 was not raised at the February 7, 1985, meeting. Not only is the record clear in this regard, but Respondent does not contend to the contrary. Indeed, neither Respondent nor General Counsel make any reference whatever in their respective briefs to Agency Exhibit 5.

3. The performance rating period for the shipyard is 1 February - 31 January (G.C. Exhs. 6 and 7). With respect to Occupational Safety and Health, CNSYDINST 12430.6C CH-3 has the following references:

> "1. Definitions
>
> . . .
>
> "e. Performance Standard. The expressed measure of the level of achievement established by management for the critical elements of a position. The methods of measurement may include, but are not limited to factors such as quality, quantity, timeliness, and Occupational Safety and Health (OSH) performance.
>
> . . .
>
> "3. Discussion of Performance Standards
>
> "a. A performance standard is a yardstick that measures how well the work is accomplished and should be expressed in terms of quantity, quality, timeliness, cost effectiveness, effort obtained, processes used, Occupational Safety and Health (OSH) performance, etc. . . .
>
> "b. For managers and supervisors, protecting the safety and health of subordinates is an integral part of supervision. Therefore, their performance in OSH shall be considered when rating the critical performance elements which are developed to measure the critical element of supervisory responsibility. In addition, OSH shall be considered when assigning the overall ratings. Significant contributions such as reductions in injury cases could result in increasing the overall rating, where poor performance, such as high injury rates in a supervisor's or manager's organization, could result in reducing the overall rating. For nonsupervisory personnel, OSH performance shall be considered when

> assigning the overall rating. Normally, nonsupervisory personnel's OSH performance will be based on how well they complied with established rules and regulations. As with managers and supervisors, significant contributions such as preventing a serious accident could result in increasing the overall rating, or poor performance such as repeated failure to comply with occupational safety and health rules in reducing the overall rating." (G.C. Exh. 6).

4. For the performance rating period February 1, 1985, to January 31, 1986, and for prior years, Occupational Safety and Health had not been a critical element (G.C. Exh. 3, Tr. 22, 24-26).

5. The reason Mr. Myers stated for not submitting proposals on February 7, 1985, was that ". . . MTC would be entering into negotiations in this area as well as anything that affects employees." (Agency Exh. 4). As noted above, negotiations did begin on March 5, 1985, and were completed on October 23, 1985; but the new agreement was not effective during the period in question, indeed Respondent stated at the hearing (April 10, 1986) that the agreement would not be effective until May 4, 1986. Although the new contract was not operative at any time material, the fact that the parties did negotiate concerning Performance Appraisals is noted. The new agreement, with respect to Occupational Safety and Health, provides as follows:

> "Section 2. Identification and Development of Performance Elements and Standards:
>
> . . .
>
> "b. For each critical performance element against which the employee will be appraised, the highly satisfactory . . ., successful . . . and marginal . . . job-related performance standards will be developed and put in writing. These standards must be expressed in the terms such as quantity, quality, timeliness, cost effectiveness, effect obtained, processes used, OSH performance, etc. . . .

> "c. Participation by the employee in the setting of performance standards is encouraged . . . Participation by the Union through the Steward or Chief Steward may occur when changing elements and standards that apply to a group of employees within the same job rating. Prior to effecting new elements and standards as noted above, the Union will be given an opportunity to offer written comments regarding the proposed critical elements and performance standards, which shall be given due consideration by Management. Management shall make the final determination on setting elements and standards.[5]

Section 1.g. governs "Critical Performance Element" and Section h. "Non-Critical Performance Element". Section 1 provides, in part, as follows:

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[5] Nothing in the Operative Agreement (Jt. Exh. 1) constitutes a waiver of the Union's right to negotiate impact and implementation of any change in conditions of employment resulting from management's exercise of any management right. To the contrary, Article II, Section 1e. expressly provides that:

> "e. Nothing in this Section shall preclude Management and the Union from negotiating:
>
> (1) Procedures which Management will observe in exercising any authority under this section; or,
>
> (2) Appropriate arrangements for employees adversely affected by the exercise of any authority under this Section by Management."

This, of course, is nothing more than restatement of §6(b)(2) and (3) of the Statute which would govern whether or not set forth in the Agreement; but inclusion in the Agreement clearly negates any assertion of waiver.

(footnote continued)

> "h. Non-Critical Performance Element: "A job element that is of such importance as to require measurement, but which is not critical. Performance on non-critical performance elements will be included as a basis for personnel decisions which affect the employee."
>
> . . .
>
> "j. Performance Appraisal Form: Department of the Navy Performance Appraisal Form or locally approved form, if permitted, will be used to record critical and non-critical performance elements and standards, supervisor/ employee comments regarding performance and the final evaluation. . . ." (Agency Exh. 10, Art. 47, Section 1).

6. On, or about, December 2, 1985, Mr. Donald M. Wilson, Chief Steward of Area 5, Chairman of the Union Negotiating Committee, and, for the years 1984 and 1985, President of Machinists Local 694 (Tr. 17), learned from his shop head that a new critical element for Occupational Safety and Health (OSH) was being added to the performance appraisals of employees in Shop 31. Shortly thereafter, Mr. Wilson learned from reports of stewards and other employees that the new critical element for OSH was being implemented shipyard-wide (Tr. 24-26). After learning of the implementation of the new critical element on a unit-wide basis, Mr.

(footnote 5 continued)

Article 47, Section 2C. of the new Agreement clearly limits the Union's role in setting performance standards to that of consultation with the right reserved to management to make the final determination on setting elements and standards, which is a management right. See, for example, National Treasury Employees Union, 7 FLRA No. 115, 7 FLRA 727 (1982); but the fact that the Union may only consult on the setting of performance standards and critical elements does not mean that the Union does not have the right to negotiate with respect to §6(b)(2) and (3) of the Statute. Quite to the contrary, the Statute confers this right unless clearly and expressly waived by the Union and there is nothing in the record to support such waiver.

Wilson, as Chairman of the Union's Negotiating Committee, sent a letter, dated December 5, 1985, to the Commander, Charleston Naval Shipyard, via the Head of Respondent's Employee Relations Division, then Mr. Scott, in which he stated, in part, as follows:

> ". . .
>
> "2. Having reviewed the elements and standards it is determined that adverse impact is reasonably forseeable upon the Unit employees subject of the proposed elements. Unit employees lack adequate training in the OSH area for which they are to be held accountable, which could result in unsatisfactory performance ratings and adverse action for performance reasons.
>
> "3. Accordingly, it is requested that the parties formally consult on the matter. . . ." (G.C. Exh. 4).

7. On December 6, 1985, Mr. Scott called Mr. Wilson. Mr. Wilson credibly testified that:

> ". . . he [Mr. Scott] said there was no way that he was going to bargain on the impact of that new element. He said he was not going to get into that business of bargaining on elements and standards, and he said, 'I don't have to bargain with you on the content of that performance element and standard,' and I told him that I understood full well that he did not have to bargain on the content of the element, and that all I was attempting to do would be to bargain the impact or implementation of it, and he just reiterated his position several times, 'I'm not going to bargain on that.' He said that would have far ranging ramifications if, when we changed elements and standards that we would have to come back to the table, and I said, 'Well, possibly, it could, because if there is going to be grave impact on the employees as a result of your decision to identify a new element, then it would be

> appropriate,' and he stood very firm in his position that he would not bargain impact and implementation, and I told him at that point, if he flat refused to bargain, that I had no recourse but to file a charge with the Authority, and he said, 'Do what you've got to do,' and I did, so that brings us to here." (Tr. 30).

Mr. Scott substantially corroborated Mr. Wilson's testimony whose testimony [Wilson's] I fully credit. Mr. Scott testified, in part, as follows:

> ". . . I said, 'it's not appropriate to negotiate on the establishment of elements and standards.' He said, 'I recognize that,' . . . and he said, 'Well, I want to negotiate on impact and implementation.' I said, 'What impact and implementation are you talking about?' He said, 'Adverse impact. You know, what will happen to this guy if he doesn't perform these safety elements and standards?' I said, 'Don,' I said, 'the same thing is going to happen to him that will happen to him if he doesn't perform in connection with his other elements and standards. He can be removed, demoted or reassigned,' . . . He said, 'Well, I think the employees should be trained in the safety area if this is something that they are going to be held accountable for.' . . . I said, 'You know as well as I do, that that's not a negotiable matter,' so he indicated that -- he ended the discussion by saying that he was going to file a ULP, and I said, 'Well, that's your option.' . . ." (Tr. 114-115).[6]

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[6] I am aware that at the commencement of his conversation with Mr. Wilson on December 6, 1985, Mr. Scott told Mr. Wilson, ". . . I had some question as to whether he had the authority to submit that letter (G.C. Exh. 4) . . .

(footnote continued)

8. On December 11, 1985, the Union, by Mr. Wilson, submitted eight proposals to Mr. W. B. Maleth, the shop head in the Machine Shop, regarding the addition of the OSH critical element (G.C. Exhs. 5(a) through 5(h)). Mr. Maleth told Mr. Wilson that his hands were tied with regard to bargaining on the proposals (Tr. 31). On December 13, 1985, Mr. Wilson submitted the same proposals to Mr. Sam Bradford, Acting Head of Employee Relations in Mr. Scott's absence. (Tr. 31). Mr. Bradford, ". . . indicated he had a problem with it . . . the position had already been established by Steve Scott, on the 6th of December, that he was not going to bargain on it. . . ." (Tr. 31; 32). No negotiations were held.[7]

(footnote 6 continued)

and to attempt to consult and negotiate on the concerns expressed in that letter." (Tr. 113); however, I give no probative weight to Mr. Scott's comment concerning Mr. Wilson's authority for various reasons including: (a) it is undisputed that Mr. Scott knew that Mr. Wilson was, in fact, the Chairman of the Union's Negotiation Committee (G.C. Exh. 8); (b) Mr. Myers, President of the Union, testified without contradiction that the Executive Board of the Council had delegated authority to its negotiating committee to negotiate all matters, including all changes in conditions of employment affecting bargaining unit employees; (c) Mr. Myers testified that he had notified management officials, including Mr. Scott, of the authority of the Union's negotiating committee (Tr. 68, 135); (d) the exercise of the committee's authority (Tr. 18); (e) on two occasions when Mr. Myers had made a separate designation he had, nevertheless, designated the same officials (Agency Exhs. 7 and 8); (f) Mr. Myers testified that Mr. Scott never questioned Mr. Wilson's authority to negotiate in connection with the OSH standards (Tr. 135) and I credit Mr. Myers' testimony; and (g) Mr. Scott did not refuse to negotiate with Mr. Wilson because of any lack of authority on Mr. Wilson's part, but, rather, because, as he told Mr. Wilson, he would not bargain impact and implementation.

[7] During the investigation of the charge, Mr. Wilson testified that he talked to Mr. Scott who indicated that if he [Wilson] would submit views and recommendations, that he [Scott] would give them some consideration. Mr. Wilson

(footnote continued)

9. It is uncontroverted that in the past when a change was proposed or implemented, notice of the change was given to the President of the Union (Tr. 37, 67). Mr. Myers testified that the Recording Secretary of the Union could also appropriately have received such notice (Tr. 67). It is further uncontroverted that in the instant case no notice was given either to the President or to the Recording Secretary of the establishment of the new critical element.

(footnote 7 continued)

stated that he told Mr. Scott that to submit views and recommendations "after the thing was already implemented, seemed like a little bit of waste a of time, but I told him I would do it anyway. . ." (Tr. 32). By letter dated January 29, 1986, signed by new Union President Jeffrey L. Linn (Agency Exh. 11), the Union submitted views and recommendations. By memorandum dated March 24, 1986, the Production Officer, Mr. G. D. Matthews, stated, in part, as follows:

> ". . . Representatives of the FEMTCC have pointed out that verbatim application of these standards would be unreasonable if employees are not indoctrinated or otherwise knowledgeable in the requirements for which they are being held responsible . . . we can not hold each individual responsible for all Occupational Safety and Health Administration requirements without proper training and adequate information available. Therefore, I feel it is necessary to issue some departmental guidelines and policy regarding the critical performance element for compliance with Occupational Safety and Health requirements. I fully concur that this requirement should be incorporated into EVERY employee's performance evaluation. However, we need to recognize that the individual employees can not be held responsible for areas out of their particular expertise and for requirements that they have no knowledge of. . . ." (Agency Exh. 12)

Accordingly, Mr. Matthews submitted modified guidelines modifying the original guides, the modification appearing as lighter typing on Enclosure (1), Employee Standards, Agency Exhibit 12. Nevertheless, no negotiations ever took place.

Conclusions

The decision to change or establish performance standards and critical elements is a management right under §6(a) of the Statute and is outside the duty to bargain. Nevertheless, there is a duty to bargain concerning the procedures which management will observe in exercising its reserved rights and concerning appropriate arrangements for employees adversely affected by management's exercise thereof. United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 116, 19 FLRA 1004, 1007 (1985). Although Respondent did not give notice to the President or Recording Secretary of the Union of its intention to establish the new OSH critical element, Mr. Maleth, shop head of the Machine Shop, did consult with Mr. Wilson, Chief Steward for Area 5, on December 2, 1985 (Tr. 24-25). Mr. Wilson stated, ". . . my shop head called me to his office and he said, 'I want you to look at this new safety element, a Critical Element No. 5, that's being added to the employees' Performance Appraisal,' and we had a discussion about it." (Tr. 24). In view of the fact that Mr. Wilson, as Chairman of the Negotiating Committee, acted on behalf of the Union, the Union had notice of the proposed new critical element; but Mr. Wilson's written request of December 5, 1985, to negotiate the impact and implementation[8] of the new critical element was refused by Respondent on December 6, 1985, at which time Mr. Scott informed Mr. Wilson that Respondent would not bargain impact and implementation. Thereafter, when Mr. Wilson submitted proposals, Mr. Maleth on December 11, 1985, refused to consider them because, as he stated, his "hands were tied"; and Mr. Bradford, in Mr. Scott's absence, refused to consider them because, "the position had already been established by Steve Scott, on the 6th of December, that he was not going to bargain on it." By its refusal to negotiate, Respondent violated §16(a)(1) and (5) of the Statute, for, as the Authority has made clear,

> ". . . where an agency exercises a management right but . . . has rejected a timely request for negotiations pursuant to

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[8] I am aware that Mr. Wilson's letter requested that the parties ". . . formally consult on the matter"; however, Mr. Wilson made it clear to Mr. Scott that the Union sought to bargain the impact and implementation (Tr. 30); Mr. Scott fully understood that the Union sought to negotiate (Tr. 114); and that Mr. Scott refused to bargain.

> section 7106(b)(2) and (3) of the Statute, the agency will be found to have violated section 7116(a)(1) and (5) of the Statute." U.S. Government Printing Office, 13 FLRA No. 39, 13 FLRA 203, 205 (1983).

See, to like effect, Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174, 15 FLRA 923-924 (1984)[9/]; Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA No. 52, 20 FLRA 474, 477 (1985); Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, and Newark Air Force Station, Newark, Ohio, 21 FLRA No. 78, 21 FLRA 609 (1986).

9/ When management exercises a reserved right under §6, a duty to negotiate pursuant to §6(b)(2) and (3) arises if the change results in an impact or a reasonably foreseeable impact on bargaining unit employees which is more than de minimis. The Authority has never referred to its "de minimis" standard in cases involving changes of performance standards and critical elements which infers that a change of performance standards and critical elements, unsatisfactory performance of which would lead to removal, reassignment or demotion, inherently results in an impact or reasonably foreseeable impact which is more than de minimis. Presumably General Counsel agrees as she has not addressed the issue of de minimis; however, Respondent does assert that the impact was de minimis because "Any unsatisfactory performance on any critical element . . . has exactly the same adverse impact . . . after addition of the safety critical element." (Respondent's Brief, p. 15), an argument I find wholly disingenuous and which begs the issue. There is no dispute that the result of unsatisfactory performance of any critical element is precisely the same; but the issue is the establishment of a new critical element. That new critical element was a change of conditions of employment as to which the Statute imposes a duty to negotiate pursuant to §6(b)(2) and (3). In any event, I find the impact of the addition of the new critical element was more than de minimis, as: (a) the change affected the entire bargaining unit of the Union shipyard-wide, i.e., some 5500 bargaining unit employees, and (b) established a new critical element, unsatisfactory performance of which Mr. Scott testified any "employee must be removed, reassigned, or demoted from that position." (Tr. 85).

Although negotiations, had they occurred, after the filing of the charge would not have cured Respondent's initial violation of the Statue, as noted in footnote 7, supra, no negotiations ever took place even though the Union submitted certain views and recommendations and Respondent modified the original guides.

I have given careful consideration to Respondent's argument, "The Respondent had no duty to bargain impact and implementation of the addition of a safety critical element to the annual performance appraisals of certain unit employees" (Respondent's Brief, pp. 8-14), which in essence is premised on its implementation of CNSYDINST 12430.6C CH-3. There is no question that prior to the issuance of CNSYDINST 12430.6C CH-3 the Union was given notice, met to discuss the proposed revision and declined to submit any written proposals; nor is there any dispute that CNSYDINST 12430.6C CH-3 refers to Occupational Safety and Health (see, findings, supra, Par. 3). Indeed, in "Definitions", it provides as follows:

> "e. Performance Standard. The expressed measure of the level of achievement established by management for the critical elements of a position. The methods of measurement may include, but are not limited to factors such as quality, quantity, timeliness, and Occupational Safety and Health (OSH) performance." (G.C. Exh. 6) (Emphasis supplied).

Thus, while CNSYDINST 12430.6C CH-3 established that OSH performance could be considered it most certainly did not make OSH a critical element. In fact, neither CNSYDINST 12430.6C CH-3 (8 March 1985) nor its predecessor, CNSYDINST 12430.6C (15 December 1982) (G.C. Exh. 7) established any critical elements; but, rather, defined 'Critical Performance Element' (also referred to as 'Critical Element') as,

> "A part of the job that is so important that performance below the satisfactory performance standard established by management requires remedial action." (G.C. Exhs. 6 and 7, Section 1d)

Management, of course, established Critical Elements for each position, see, e.g., G.C. Exh. 3; but for the performance rating period February 1, 1985, to January 31, 1986, and for prior years, OSH had not been a critical element. The designation of OSH as a critical element, i.e., "Critical Element #5 Compliance with Occupational Safety and Health Requirements" (G.C. Exh. 2), did drastically alter the performance standards of all bargaining unit employees in that OSH performance, was now made a separate critical element, unsatisfactory performance of which would require removal, reassignment, or demotion. Respondent's reliance on U.S. Department of Labor, Employment Standards Administration and American Federation of Government Employees, Local 2513, Case No. 2-CA-40119, Administrative Law Judge Decisions Report No. 41 (September 27, 1984), is misplaced as that case did not involve establishment or change of any critical element. Having considered Respondent's argument, including case citations, I find them unpersuasive.

As Respondent rejected the Union's timely request, pursuant to §6(b)(2) and (3) of the Statute, for negotiations, Respondent thereby violated §§16(a)(1) and (5) of the Statute, U.S. Government Printing Office, 13 FLRA No. 39, 13 FLRA 205 (1983). Because Respondent refused to negotiate, at which time the Union had submitted no proposals, it is unnecessary to consider the Union's specific proposals (which Respondent also declined to consider) and I expressly decline to do so.10/

10/ Proposals which would contractually obligate an agency to provide formal training, to periodically assign employees to specific types of training programs, and to make specific training assignments are outside the duty to bargain. American Federation of Government Employees, AFL-CIO, Local 3004 (Otis Air Force Base), 9 FLRA No. 87, 9 FLRA 723 (1982). General Counsel's assertion that, ". . . proposals regarding training programs are not ipso facto outside the duty to bargain. Only those proposals which are so specific as to require management to include specific items in their training have been found to be non-negotiable." (General Counsel's Brief, p. 11), is neither supported by the Authority's decisions nor does it correctly reflect the Authority's decisions. As the Authority stated, in part, in Otis Air Force Base, supra, any proposal which would contractually obligate an agency to provide "formal training" is outside the duty to bargain and in American Federation of State, County and Municipal Employees, Local

(footnote continued)

Remedy

General Counsel seeks a status quo ante remedy requiring Respondent to rescind the new OSH critical element and bargain regarding impact and implementation as required by the Statute. (General Counsel's Brief, p. 14). The Authority set forth, in Federal Correctional Institution, 8 FLRA No. 111, 8 FLRA 604, 606 (1982), five factors it will consider in determining whether a violation of the duty to bargain over impact and implementation warrants a status quo ante remedy. Factor (1) "whether, and when, notice was given to the Union. . ." As noted herein above, the Union's Chief Steward, Mr. Wilson, who was also Chairman of the Union's Negotiating Committee, was consulted by his shop

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(footnote 10 continued)

2910, AFL-CIO (Library of Congress), 15 FLRA No. 112, 15 FLRA 541 (1984) and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 22 FLRA No. 4, 22 FLRA 15, 25 (1986), the Authority made it further clear that any proposal that would mandate that training be provided by the Agency is outside the duty to bargain, although a training period is permissible. See, also: International Brotherhood of Electrical Workers, AFL-CIO, Local 121, 8 FLRA No. 35, 8 FLRA 188 (1982) (Training to keep employees abreast of new technologies); International Association of Fire Fighters, AFL-CIO, CLC, Local F-116, 7 FLRA No. 122, 7 FLRA 752 (1982), International Association of Fire Fighters, Local F-61, 3 FLRA No. 66, 3 FLRA 438 (1980) (to limit time of assigned training); National Association of Air Traffic Specialists, 6 FLRA No. 106, 6 FLRA 588 (1981) (specified training); American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals, 4 FLRA No. 52, 4 FLRA 384 (1980) (weapons practice and qualification firing).

Moreover, while training in general may not be mandated, as an arrangement, pursuant to §6(b)(3) for employees adversely affected, training is within the duty to bargain. International Brotherhood of Electrical Workers, AFL-CIO, Local 121, 8 FLRA No. 35, 8 FLRA 183, 189 (1982). Here, employees were adversely affected by Respondent's establishment of the new critical element and I would find, if it were necessary to consider the matter, that training "in the OSH requirements applicable to their work and work area" (G.C. Exh. 5(a)), for example, was negotiable pursuant to §6(b)(3).

head on December 2, 1985, with regard to the new OSH critical element which Respondent proposed to add to the appraisal forms beginning February 1, 1986, notwithstanding that notice was never given to the Union's President or Recording Secretary. Because Mr. Wilson received notice and acted on behalf of the Union, I have found that adequate notice was given to the Union. Factor (2) "whether, and when, the union requested bargaining on the procedures to be observed . . . and/or . . . appropriate arrangements for employees adversely affected. . . ." The Union requested bargaining by letter dated December 5, 1985, which request was rejected by Respondent on December 6, 1985. Notwithstanding Respondent's refusal to negotiate on December 6, 1985, the Union submitted proposals which Respondent refused to consider, first by Mr. Wilson's shop head, on December 11, 1985, who said his hands were tied, with regard to bargaining, and second, by the Acting Head of Employee Relations, on December 13, 1985, for the reason that the position had already been established on December 6, that he was not going to bargain. Factor (3) "the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute." "Willful", as applicable, is defined as: "1: governed by will without yielding to reason or without regard to reason: obstinately or perversely self-willed . . . 2: done deliberately . . . intentional, self-determined. . . ." Websters Third New International Dictionary (1971). As I have found, Mr. Scott, on December 6, 1985, told Mr. Wilson, ". . . there was no way that he was going to bargain on the impact of that new element" which was reiterated by the Acting Head of Employee Relations on December 13, 1985. Moreover, when, during the investigation of the charge, the Union was requested to submit its position and did so on January 29, 1986, with the further request for negotiations (Agency Exh. 11), Respondent failed and refused to negotiate even though it conceded it found merit to the Union's contention. At the hearing, Mr. Scott readily admitted that there "most definitely" (Tr. 91) was a difference when a critical element is added but counsel for Respondent asserted that ". . . the addition of a new critical element is a form over substance" (Tr. 95). It is clear that, notwithstanding Respondent's admission that adding a new critical element results, most definitely, in a substantial change of conditions of employment, Respondent refused to negotiate impact and implementation because "that would have far ranging ramifications if, when we changed elements and standards that we would have to come back to the table." Respondent's refusal to negotiate impact and implementation was deliberate, intentional, obstinate, self-willed, self-determined and, therefore, willful; and was intended to avoid its statutory obligation to negotiate pursuant to §6(b)(2) and (3) of the Statute. Factor (4) "the nature and extent of the impact experienced by adversely affected employees." The new OSH critical element was added unit-wide and affected some 5500 bargaining unit employees. Failure to satisfactorily perform this new critical element would result in removal, reassignment or demotion (Tr. 85). Factor (5) "whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations." There is no evidence, indeed no assertion, that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations. The new OSH critical element was added for the appraisal period beginning February 1, 1986, and ending January 31, 1987. The record does not show that interim appraisals had been, or will be, made; but the annual appraisal will not be made until at, or near, the end of the appraisal period. Presumably, therefore, no disruption would result since appraisals have not yet been made for this new critical element. It is conceded that, without OSH being a critical element, OSH performance may be factored into employee performance appraisals in general so that Respondent would not be precluded from considering OSH performance. Accordingly, no disruption of Respondent's operations would result from a status quo ante remedy. Therefore, in full agreement with General Counsel, I conclude that a status quo ante remedy is both appropriate and necessary to remedy Respondent's blatant refusal to negotiate pursuant to §6(b)(2) and (3) of the Statute. San Antonio Air Logistics Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA No. 22, 5 FLRA 173 (1981); Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA No. 63, 14 FLRA 390 (1984).

Having found that Respondent violated §16(a)(1) and (5) of the Statute by its rejection of the Union's timely request for negotiation pursuant to §6(b)(2) and (3) of the Statute, I recommend that the Authority adopt the following:

ORDER

Pursuant to §18(a)(7) of the Statute, 5 U.S.C. §7118(a)(7), and §2423.29 of the Regulations, 5 C.F.R. §2423.29, the Authority hereby orders that the Department of Defense, Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, shall:

1. Cease and desist from:

(a) Implementing as a critical element, "Compliance with Occupational Safety and Health Requirements" for any bargaining unit position, unless such critical element had been implemented for an appraisal period prior to the appraisal period beginning February 1, 1986,[11] without giving prior notice to the Federal Employees Metal Trades Council of Charleston, AFL-CIO, the employee's exclusive representative, and affording it the opportunity to negotiate concerning the procedures to be observed in implementing such critical element and concerning appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Withdraw and cease applying the Occupational Safety and Health critical element newly established for bargaining unit employees for the appraisal period beginning February 1, 1986, and withdraw any appraisals made, if any, pursuant to the said Occupational Safety and Health critical element.

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[11] I am aware that Rigger/WG 5210-10, for example, has had a critical element "Performs assignments safely with first time quality" since 1981. Nothing contained in this Paragraph or in Paragraph 2, *infra*, is intended to have, nor shall it have, any effect on any critical element as established for any appraisal period prior to the appraisal period beginning February 1, 1986, even if such critical element concerned "safety".

(b) Provide the Federal Employees Metal Trades Council of Charleston, AFL-CIO, with prior notice of a decision to establish for bargaining unit employees a critical element for compliance with Occupational Safety and Health Requirements, and, upon request, negotiate concerning the procedures to be observed in implementing it and concerning the appropriate arrangements for employees adversely affected thereby.

(c) Post at its facilities at the Charleston Naval Shipyard, Charleston, South Carolina, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such form they shall be signed by the Shipyard Commander, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to §2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region IV, Federal Labor Relations Authority, 1371 Peachtree Street, NE., Suite 736, Atlanta, Georgia 30367, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 30, 1986
Washington, D.C.

[4-CA-60147]

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement as a critical element, "Compliance with Occupational Safety and Health Requirements" for any bargaining unit position, unless such critical element had been implemented for an appraisal period prior to the appraisal period beginning February 1, 1986, without giving prior notice to the Federal Employees Metal Trades Council of Charleston, AFL-CIO, the employee's exclusive representative, and affording it the opportunity to negotiate concerning the procedures to be observed in implementing such critical element and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL withdraw and cease applying the Occupational Safety and Health critical element newly established for bargaining unit employees for the appraisal period beginning February 1, 1986, and withdraw any appraisals made, if any, pursuant to the said Occupational Safety and Health critical element.

WE WILL provide the Federal Employees Metal Trades Council of Charleston, AFL-CIO, with prior notice of a decision to establish for bargaining unit employees a critical element for compliance with Occupational Safety and Health Requirements, and, upon request, negotiate concerning the procedures to be observed in implementing it and concerning the appropriate arrangements for employees adversely affected thereby.

____
(Agency or Activity)

Dated: __________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1371 Peachtree Street, NE., Suite 736, Atlanta, GA 30367 and whose telephone number is: (404) 881-2324.

[7-CA-50347]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
OGDEN SERVICE CENTER
OGDEN, UTAH

Respondent

and

Case No. 7-CA-50347

NATIONAL TREASURY EMPLOYEES
UNION, WASHINGTON, D.C.

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on July 28, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 15, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[7-CA-50347]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

INTERNAL REVENUE SERVICE
OGDEN SERVICE CENTER
OGDEN, UTAH

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION, WASHINGTON, D.C.

Charging Party

Case No. 7-CA-50347

Nicholas J. LoBurgio, Esquire
Joseph Swerdzewski, Esquire
For the General Counsel

Raymond W. Laing, Esquire
For the Charging Party

James E. Dumerer, Esquire
For the Respondent

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code (5 U.S.C. § 7101 *et seq*.) and the Rules and Regulations of the Federal Labor Relations Authority (5 C.F.R. Chapter XIV, § 2410 *et seq*.). It is based on a charge filed by the National Treasury Employees Union on March 25, 1985 and amended June 14, 1985, and a Complaint issued on June 25, 1985 by the Regional Director of the Federal Labor Relations Authority, Region VII. The complaint alleges that Respondent violated Section 7116(a) (1) and (2) by discharging Margaret E. Mills on April 5, 1985 because she sought the Union's assistance in the filing of a grievance.

At issue is whether Mills was terminated because of such protected activity, or because of excessive leave usage and tardiness, indebtedness letters, and insubordination.

The matter was heard on September 20, 1985, in Ogden, Utah. Based upon the entire record, and my observation of the witnesses, I make the following findings of fact, conclusions of law and recommendations.[1]

Findings of Fact

Margaret E. Mills was employed first as an intermittent and later as a seasonal employee at Respondent's Service Center in Ogden, Utah. The parties agree that her probationary year would have been completed on April 29, 1985, although she had begun to work on January 12, 1984. Beginning in April 1984, she worked in the Collection Branch of the Service Center as a GS-3 clerk under the supervision of Tonya Day (until July 22) and LaVerne Cottrell (until October 2), and finally, under Larry Gallegos, a new (probationary) supervisor. Gallegos testified that he noticed during his first week as manager, while working with Cottrell, that Mills was late on the first three days. He asked Cottrell if this was an "ongoing instance . . . or a bad week" and was told that Mills was a newlywed and "she was given the benefit of the doubt." Mills had been married on August 24. During the rest of October, despite a staff meeting in which he emphasized punctuality, Gallegos asserts that Mills was late several times a week by five to fifteen minutes. He spoke to her about it during the second and third weeks, and was assured the problem would be resolved. A week later, in the absence of improvement, he spoke to her about the possibility of using AWOL, LWOP and a Leave Restriction Letter. He told her he would give her a month to work on her problem. He did not keep records of these counselings, he asserts, because he did not "want to give the impression of being a stickler or real tough on any of the employees."

During November (or the 30-day period) Mills was, according to Gallegos, late on 11 occasions. He asserts that he kept track of this record through the use of "memory joggers" which he placed in her job file. On November 27, Gallegos again counseled Mills, this time recording it in her Counseling Record (G.C. Exh. 4). That record indicates he discussed both "constant tardiness and excessive leave use", and presented her with a letter dated November 26 (G.C. Exh. 3) which called attention to her frequent use of sick and emergency annual leave[2] and imposed the following leave restrictions on her for the next six months:

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[1] Counsel representing the General Counsel moved to correct errors in the hearing transcript. Under authority reflected in 5 C.F.R §2423.19(r), the proposed corrections are approved.

> 1. Any absence due to illness, regardless of duration, must be verified by a doctor.
>
> 2. LWOP will not normally be approved. AWOL, which can be the basis for disciplinary action, will be used where annual and/or sick leave is insufficient to cover an absence.
>
> 3. Unscheduled annual leave will be charged to AWOL, absent extenuating circumstances.
>
> 4. All tardiness will be charged to AWOL, absent extenuating circumstances.

Gallegos testified that he destroyed his memory joggers after this counseling session. Both the entry in the Counseling Record and the Leave Restriction Letter were read to Mills, who testified that she was not aware of her right to comment on either.

Mills acknowledges that she was late on several occasions in October and November (as were others) and concedes that Gallegos may have talked to her about it, but did not recall that he made "any official deal about it". She asserts that Gallegos gave her the Leave Restriction Letter without warning, and that he explained that he had received one once and it had helped him, that it would help her and would be wiped off her record in six months. Again, she testified that he did not make a "big deal" about the matter. Thereafter, while Mills may have been tardy on a few occasions in December and January, no entries were made in her Counseling Record until January 30, 1985, allegedly because Gallegos "wanted to work with her".

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[2] While the emphasis of the letter appears to be on leave use and tardiness is "subordinated" to restriction number four, Gallegos testified that tardiness was the main issue, although she was inevitably using her four hours of sick leave and annual leave as soon as it was earned.

Meanwhile, on November 13, Gallegos received a letter from J. C. Penney about an alleged indebtedness of Mills in the amount of $68.48 resulting from a returned check in August 1983. Penney asserted that she had ignored two court summons and that a bench warrant for her arrest had issued. On a form used by Respondent's Employee-Management Relations Section, (EMR) Gallegos was instructed to discuss the matter with Mills, and to inform that office of her position. IRS policy is to advise the employee to make immediate arrangements for settlement of any debt which was acknowledged or which a legal judgement exists. Absent such conditions IRS would take no action other than to advise the creditor of the employee's position.

In his required response, Gallegos reported that he spoke to Mills, who said the original cost of $10.00 had gone up to $68.48 because of service charges, that the check had been written for a former employee which was the real debtor but which had gone bankrupt, and that J. C. Penney was trying to make her responsible for the payment. Gallegos further reported that he asked her to call Penney and explain what had happened, and that she replied that it "wasn't my business or IRS's business what she did outside of work." This statement was contemporaneously recorded by Gallegos in his report to EMR.

Mills testified that Gallegos showed her the letter, said he had been instructed to counsel her, and told her that the matter was none of IRS's "damn" business, and that she agreed. Again, she said it did not seem to be a "big deal." She also told him that he was trying to settle the debt, which she said was far too high. Mills' Counseling Record contains no reference to this incident, nor did Gallegos follow up on the status of the dispute, although the IRS Manual requires a supervisor to take an active interest in an indebtedness case until it is satisfactorily resolved. (G.C. Exhs. 24 and 25).

General Counsel contends that Gallegos and Mills agree that it was he who said that the J. C. Penney debt was none of IRS's damn business. I find no record support for this assertion except, arguably, on line 23 of Transcript page 164. However, it seems clear from the context that Gallegos was saying that he used such profanity when he attributed the word damn to Mills in a later memorandum recommending her separation (G.C. Exh. 12), i.e. that he knows by reference to Respondent Exh. 2, which is his account of their discussion of the J. C. Penney debt, that she had not used the word "damn" when she told him that subject was none of his or IRS's business. He further indicates that he drafted G.C. Exh. 12 at home without Respondent Exh. 2, and that his use of the word damn derived from Mills recent insolence in telling him to go to hell. I find, especially in view of Gallegos' contemporaneous account of the incident in Respondent Exh. 2, that it was Mills who made the remark.

On December 11, 1984, Respondent posted a Vacancy Announcement for a permanent GS-3 Clerk position in the very job Mills held as a seasonal (WAE) employee. Mills applied and was evaluated by Gallegos.[3] He gave her a "4" on her Quantity of Work Produced, indicating she achieved and sometimes exceeded a fully acceptable level of performance. He also gave her a "4" on the Quality of Work but dropped her to a "3" (fully acceptable) on Dependability. His explanation for the latter was that she did not meet one of the five factors, that which requires observance of prescribed working hours.

According to Mills, Gallegos told her he would have given her "5s" (the highest rating) in job performance, but upper management would not permit him to do so. There is, in fact, no dispute concerning the high quality and quantity of work done by Mills. However, when Gallegos notified Mills on January 22 that he had selected her for the position, he claims that he told her he had mixed emotions about it because, while her work performance was good he was having a problem with her tardiness. He further asserts that, based on an earlier conversation in which she told him that management never recognized her good performance, he "was taking a chance on selecting her and I hoped that this would be the turning point in her career . . . as far as getting rid of the tardiness problems." G.C. Exh. 23 indicates that the change to permanent status was to become effective on February 3, 1985.

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[3] This position was, in effect a "promotion", or enhancement in earning power. When the computers were "down", WAE's were sent home on annual leave, LWOP (and at least sometimes in Gallegos' section, on sick leave). Permanents were if possible given other clerical work, thus avoiding loss of pay and continuing to accrue rather than losing leave.

On Monday, January 28, Gallegos told his subordinates that they would not be needed on Tuesday because the computers would be shut down. However he stressed his need for them to report for work on Wednesday. However Mills did not show. She called him before the shift began to advise them that she had a cold. Gallegos told her she would have to see a doctor and provide an excuse the next day, and she responded that she could not afford to see a doctor for a cold. According to Mills she then offered to come in, but he said "if you're sick, you're sick". Gallegos asserts that he threatened her with AWOL if she reported without medical verification and that she said she would come to work but did not do so. Her Counseling Record indicates in a brief entry that he told her when she called that she should get a doctor's excuse, that she said she only had a cold and would not bring one, and that he replied that they would discuss her failure to secure a medical statement when she came in on January 31. It also indicates that he placed her on AWOL for that date. He was clearly suspicious of this use of sick leave.

Mills reported for duty on January 31 still sick according to her testimony, and informed Gallegos that she did not have a doctor's excuse.[4] According to both of them, he then placed her on AWOL for the day before. She had a red eye as from a burst blood vessel. Gallegos says he offered to remove the AWOL if she either got a doctor's certificate or got the Nurse's office to verify her illness. According to Mills, he simply told her to go home if she was still ill, or go to the Nurse's office. She went to the Nurse, where she was given Tylenol III for a cold, and registered a temperature of 101. She reported this to Gallegos, but did not bring from the Nurse any verification of her condition. Contrary to General Counsel's contention, G.C. Exh. 8, a form indicating that she had a cold and was given Tylenol, but which did not record her claimed temperature, was not provided to Gallegos (Tr. 73; 17-20). Mills remained at work the rest of the day.

Gallegos on January 31 told her that the Employee-Management Relations office had forwarded another indebtedness letter of January 26 from J. C. Penney. He asked her to take care of it, and she told him she was making an effort to work it out. This second letter (G.C.

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[4] She was, Gallegos testified and recorded in his entry in her Counseling Record, again late.

Exh. 7) reported that J. C. Penney had had no contact with Mills since March 30, 1984, notwithstanding its earlier contact with IRS in November, that it had been unsuccessful in its effort to garnish her wages in Small Claims Court, and that it therefore sought assistance from IRS. Gallegos asked to her to take care of the problem, and reported to the Employee-Management Relations Section on January 31 that "(s)he insists her personal life is her business." (R. Exh. 3). The contrast between the letter and her claim she was making an effort appears not to have been discussed.

Gallegos again spoke to Mills on February 5, after an acting supervisor reported that she had been 15 minutes late due to running out of gas on February 1.[5] He offered to remove her AWOL for the recent absence if she would bring in a doctor's certificate for that day. She said she did not think she would bring one in. He responded that he was holding up her conversion to permanent status until the problems with her dependability were straightened out, i.e., when the Leave Restriction letter was abolished.

On February 7, Mills again ran out of gas on her way to work. She was using her husband's truck, which she said had a broken gas gauge. He believed there was enough gas. They walked to a nearby gas station which did not open until 6 a.m., her reporting time. When it opened she called Gallegos, who she said "sounded in disbelief" and then they took gasoline back to the truck. A Utah Highway Patrolman offered assistance and Mills requested a note for her boss. The Patrolman said he could not do that, but changed his mind after he departed and returned to issue her a warning ticket for presentation to Gallegos. Mills "proudly" handed him the warning ticket, believing that the ticket would satisfy the mitigating circumstances of the Leave Restriction letter.

Later that day Gallegos told Mills of his decision to place her on AWOL for one-half hour. He explained that, because of the incident one week before, and their discussion of it, she had a responsibility to insure that she had gas in her tank. She became incensed, and said she felt it was unfair and was going to speak to Pam Richardson, the Union steward. She then spoke to Richardson, explaining that it was unfair to be placed on AWOL when she had an "excuse" from the Highway Patrolman, and they decided to file an grievance.

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[5] Mills said again, that the acting supervisor, when she informed him by phone that she had run out of gas, responded that it was "No big deal" and he would send somebody after her.

The grievance alleged violations of the preamble to the collective bargaining agreement; Article 3, Section 1 (having to do with the right to initiate a grievance without interference, restraint, coercion, etc); Article 17, Sections 2, 3, and 4 (having to do with the administration of sick leave; and the IRM, FPM and CSRA. The nature of the grievance was described as "Leave usage - AWOL - Harassment". As relief, it requested that IRS:

1. Stop threatening to take Mills' permanent position away from her.
2. Remove the leave restriction letter from her file.
3. Change the AWOL for 1/30/85 to sick leave.
4. Change the AWOL for 2/7/85 to administrative leave.
5. Train Gallegos adequately on the contract, FPM and IRM, and on the handling of employees.
6. Present a written apology to Mills'.
7. Instruct Gallegos on proper confidentiality "on employees . . . in regards to leave letters or derogatory statements."

Certain leave records and other information were requested.

On February 11, Sandy Fine Food wrote to IRS about an alleged $288.43 indebtedness for its catering of Mills' wedding on August 24, 1984. It claimed that she had repeatedly promised to start payment on the bill, but had not done so. Gallegos spoke to her about her responsibilities, but apparently did not press the matter with any vigor and did not explore the status of her other debt. His note to Employee-Management Relations indicates that she both said that she had contacted them and made arrangements to pay and assured him that she would contact them immediately and resolve the problem (R. Exh. 4).

The first-step grievance session occurred on February 20. Present were Mills, Richardson, Gallegos and a Bud

Mortenson of Labor-Management Relations. The main issues were the one-half AWOL on February 7, the eight hours AWOL on January 30, the request that the Leave Restriction letter be lifted, and leave records which Richardson asserted would show that Mills' leave usage would compare favorably with that of others. Gallegos agreed to remove the 30 minutes AWOL on the ground it had been imposed because of a "lack of communication" between him and Mills. This was based on her alleged failure to explain fully at the time of the incident that she had used her husband's truck, that gasoline had been put in it the day before, and that she did not know that the gas gauge was broken or that the points were bad. Gallegos also offered to remove the eight hours AWOL if Mills would secure a statement from her physician as required by the Leave Restriction letter. He refused, however, to remove that letter or to convert her to permanent status, saying he would take the latter step when her "dependability makes the conversion appropriate".

Mills asserted that she attempted to secure a doctor's verification of her illness on January 30. She had gone to see an eye doctor about the broken blood vessel in her eye and he had told her that coughing or sneezing when one has a cold can cause such an injury. She explained this to Gallegos at the grievance meeting, and he asked that she get a note from the doctor to that affect. She asked the doctor, who responded that he could not provide a note stating that she had a cold because he had only treated her for the broken blood vessel. She so informed Gallegos.

On February 22, Mills was again tardy, having overslept. Gallegos excused it, as he had an incident on February 12 when fog caused her to be late. On March 5 she was again late due to car problems. Gallegos took her to the Section Chief's office and told her she was five minutes late. She disputed that, claiming she was only three minutes late. He responded that she was, on the average for the past ten days, at least one minute late every day, and that he was therefore placing her on AWOL for fifteen minutes. She became very upset, told him she would rather quit (or did quit) rather than put up with such treatment, and that he could go to hell. She then walked out and went to the Union office. She reported back later in the day and "apologized"[6] to Gallegos, who told her it was a good thing he had a strong shoulder and instructed her to go back to work. An entry to her Counseling Record covers this incident but was not shown to, or initialed by her.

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[6] She told him that she supposed she should apologize but was not really sorry - she shouldn't have said what she said, but she was really upset.

The second-step grievance meeting occurred on March 13, before Naomi Bushell, Gallegos' immediate supervisor. The cast was otherwise the same, except that Gallegos was not present. Richardson told Bushell that her research disclosed that Mills leave record was no better and no worse than that of other employees, and that the leave letter therefore should not have been issued, particularly in the absence of any prior counseling. Bushell replied that she did not wish to talk about the other employees - she was only concerned with Mills. Whatever other discussion ensued, and surely there was more, was not explored. We know only that Bushell:

1. Supported Gallegos in his decision to remove the AWOL for February 7, 1985 and to remove it for January 30 upon medical verification of her illness.

2. Rejected an amended grievance requesting that the 15 minute AWOL imposed on March 5 be removed.

3. Agreed with Gallegos that the Leave Restriction letter should continue in effect because of Mills' continuing tardiness.

4. Concluded that Mills' performance had not improved enough to warrant conversion to permanent status at that time.

On or about March 11, Gallegos drafted a recommendation that Mills be terminated before the end of her probationary year (April 29). That memo (G.C. Exh. 12), bears the date of March 14, one day after the second-step grievance meeting of which he was aware. According to Gallegos, her "last episode of insolence" (March 5) caused him to reflect upon the fact that he was spending "a whole lot more time with her than any other employee in the unit" and that she would soon complete her probationary year. He concluded that she was unlikely to change her ways and that it would be "almost impossible to take any action" if he permitted her to finish her year. He therefore, while at home, drafted his memo to Naomi Bushell. He asserts that it took two or three days before the typed memo was on his desk for signature when work began on March 14. That memo said:

> This is a written request for the termination of Margaret Mills from employment at the Internal Revenue Service Center, Ogden, Utah. It would be essential for termination action to be initiated prior to Margaret's completion of her probationary period on April 29, 1985.
>
> Since becoming manager in Unit C-4 Collection Branch, it has become a regular occurrence to counsel Margaret on her excessive leave usage and tardiness. On several occasions, verified by written documentation, I told Margaret to adhere to regulations regarding tardiness. Margaret continued to report to work late on frequent occasions. This resulted in Margaret being charged AWOL on three occasions (01-30-85, 02-07-85, and 03-05-85).
>
> My attempts to get Margaret to report to work on time have been futile. My feelings as a unit manager are that severe disciplinary action such as termination is not warranted for tardiness and excessive leave use alone. However, with Margaret's recent insubordination to myself on two noted occasions listed below, I feel differently:
>
> 1. Margaret has received three letters of indebtedness. While counseling Margaret on one of these letters of indebtedness I received from EMR on a outstanding balance on a charge account, she stated that it was none of mine or IRS's damn business what she did on her own time and with her personal life.
>
> 2. On March 5, 1985, while counseling Margaret about subsequent tardiness and notifying her of having to change her AWOL, she told me to "Go to hell!"

> Naomi, I feel that no matter what I do or how many times I may counsel Margaret in the future pertaining to her dependability, she will not adhere to our organizational goals; therefore, I have no alternative but to request termination action for the moral [sic] of the unit and the good of the service.

Gallegos admits that he erroneously supplied the word "damn" in reporting her remarks about his or IRS's business in dealing with the letter of indebtedness. It was inconsistent with his account of the incident in his original report, and he attributes the mistake to the fact that he was home without his records and was confused by later use of profanity. He insists however, that the balance of the statement is hers, as the record (Resp. Exh. 2) indicates, rather than his as she contends. I credit Gallegos.

Also on March 14, as reflected in the Counseling Record, Gallegos and Mills had another discussion, one initiated by her. As she testified, she was growing fearful as a result of the meeting with Bushell the day before. She felt her job was in jeopardy. She told him that she felt things had gone too far -

> the whole grievance had gone too far, that I wanted to try hard to be a good employee and I was doing my best to be a good employee. And I would try harder if that's what he wanted. And if he could persuade Naomi in some way to try and stop this from where it is, let me continue with my Leave Restriction Letter, and I would try by best.

Gallegos' account is quite similar, indicating that Mills told him that she was "really taking (him) serious now . . . (and) understood what he was saying". She asked whether they could not start over with a clean slate. Gallegos stated that he did not wish to discuss the grievance because it had gone past his level, and Mills asked that he tell Bushell (who handled the second-step) that Mills would really change her ways and become a dependable employee. He told her he would do so, but that the matter was now out of his hands.

The tenor of this conversation clearly suggests that Mills was not concerned about an unsuccessful grievance but rather about the prospect of severe discipline, indicating that she may have known of the termination memo. In any event, Gallegos relayed her message to Bushell, indicating that she seemed sincere in her desire for another chance. Bushell was unreceptive to the idea that yet another chance would be sensible. Bushell already had the memo recommending termination.

Gallegos testified that Mills continued to arrive at work late after their discussion on March 14. Union Steward Pam Richardson testified that Gallegos told her, at some point between her filing of the grievance on March 7, and the first-step meeting on March 20, that Mills had been there everyday and on time. These views do not necessarily conflict.

On March 15, Richardson wrote Collections Branch Chief Joe Ann Phipps requesting a third-step meeting and specifically noting that Bushell was unwilling to deal with her materials brought to the meeting. These in the main consisted of charts prepared for purposes of leave comparisons. The letter amended the grievance to add the failure to convert Mills to permanent, and restated the request for information.

On March 20, Mills, Richardson and the acting Chief Steward met with Branch Chief Phipps and Mortenson. The Union contended it had not yet received all the material it requested, that imposition of the Leave Restriction Letter was illegal because not preceded by counseling and that other employees had used as much or more leave than Mills; in sum, that Mills was unfairly singled out. There is no evidence of Phipps' response, except for her memo on March 28 to the NTEU Chapter President. She simply asserted that she had reviewed the grievance and all the information which had "surfaced", and had found no violation of the contract. Accordingly she denied the remedy requested.[7]

Later in the day on March 20, Phipps presented Mills with a termination letter signed by James Grant, Acting Director of the Service Center, which was to be effective on April 5, during her probationary period. The reasons set forth were:

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[7] The grievance was not further processed.

> Misconduct in violation of Handbook of Employee Responsibilities and Conduct. This includes excessive tardiness, unauthorized absences, improper attitude, indebtedness letters and insolent remarks made to your supervisor.

Phipps had discussed Gallegos' termination recommendation with Bushell, decided that termination was indicated, and made such a recommendation to Mr. Max Peppleton, Chief of the Compliance Division and immediate subordinate of Mr. Grant.

Phipps admitted that she made no independent investigation of the allegations in Gallegos' memo recommending Mills' termination. They were discussed with Bushell and Gallegos. Phipps was provided with the letters of indebtedness, but did not attempt to determine whether Mills had made an effort to pay those bills. Her decision to recommend discharge was based on those letters "coupled with Ms. Mills' attitude toward that issue," (i.e., that it was none of IRS' business).

James Grant, Acting Director of the Service Center when he signed the letter terminating Mills, testified that the considerations for such termination were Mills' probationary status and certain "conduct issues and the repetitive nature of those" which he labeled undesirable performance. He met with Mills and Richardson and considered their defense based on the tardiness of others, and the problem of the clocks not being synchronized, but was not dissuaded from his position that termination was warranted.

Sometime after March 20, Gallegos took one Karen Davidson, who worked beside Mills, into Joe Ann Phipps' office about some work problem. Davidson returned to her desk in tears, and Mills escorted her to the ladies room where she could get it off her chest. Mills then suggested that they meet with Union Steward Richardson. They did so, and later during the day Gallegos said to Mills: "What am I supposed to think of you Maggie, instigating another grievance against me?"

A word is in order about the evidence regarding leave usage and tardiness. Much is made of this subject, particularly the former, and the record contains extensive charts (G.C. Exh. 21 A & B) prepared by the Union to establish that Mills was not guilty of excessive leave use. It should first be noted, to put the matter in perspective, that the notice of decision to terminate spoke to, inter alia, "excessive tardiness (and unauthorized absences". (G.C. Exh. 11). Gallegos' memo recommending termination said that it had become a "regular occurrence to counsel (Mills) on excessive leave usage and tardiness"; that he on several occasions had told her to adhere to regulations regarding tardiness but her continued tardiness on frequent occasions led to imposition of AWOL on three occasions (one of which had since been excused); that his attempts to get her to report on time had been futile; and finally, that tardiness and excessive leave use do not alone warrant termination. I think it fair to say that the greater emphasis here is on tardiness, and it alone led to the use of AWOL.

The record shows that no other probationary employee had been placed on AWOL (R. Exh. 7). Employee Jean Colvert testified that at least one other employee was tardy as often as Mills without incident. Union Exhibit 21 A, which concerns the unit from which Mills transferred into Gallegos' unit, for the period April 1984 through January 1985, shows that, of 20 employees, eight used as much or more annual leave, three used more sick leave and one used considerably more LWOP.[8] The chart showing leave usage in Gallegos' unit, from July 1984 through January 1985, also attempts to separate for purposes of comparison, the three employees who transferred with Mills from the other unit. Of 17 employees, according to Richardson, it shows 10 who used more annual leave, seven who used more sick leave and two who used as much or more LWOP. It is not clear to me that those comparisons are good ones, but the fundamental flaw is that the charts do not show which employees are seasonal and which permanent, nor how much leave they had and accrued. As a first year seasonal, Mills accrued the lowest possible amount of leave. Furthermore, the use of various kinds of leave, including sick, when machines were down, and the uneven impact of such down periods on permanents and seasonals, makes it very hard to draw any conclusions from the materials presented. It is clear that many used more leave and also that many had more. Gallegos testified that Mills tended to use leave as quickly as she earned it, and the charts tend to support that. She earned 4 hours of annual and sick leave per pay period. In the 15

8/ Steward Richardson who prepared the charts, said 10 used "about as much and more" annual leave. The chart shows five used more and three almost as much.

pay periods covering July through January she would have earned 60 hours of each, and she used 52 and 44 respectively. Of the approximately 80 hours earned from April through January, she used 76 and 68 respectively. Be that as it may, the charts are not terribly probative as respects patterns of total leave usage. I find more significant the fact that only one employee was tardy so often, that no other probationary was placed on AWOL (and this before any protected activity) and that Mills did use leave almost as rapidly as she earned it.

Discussion and Conclusions

It is not disputed that Mills was engaged in protected activity on and after February 7, 1985, and that all agents of Respondent involved in the decision to terminate her were fully aware of that fact. The first question then, is whether such activity was a consideration in Respondent's decision to terminate her. If the General Counsel establishes that it was, it falls upon Respondent to show, by a preponderance of the evidence, that it would have reached the same decision to terminate Mills even in the absence of her protected conduct. Internal Revenue Service, Washington, D.C., 6 FLRA 96, 99.

The main thrust of General Counsel's case is that the presence of such unlawful motivating factor can be demonstrated by the absence of evidentiary support for the proffered reasons, i.e., that they are pretexts, the timing of the termination with respect to the processing of the grievance, Gallegos' rhetorical question about what he was to think of Mills' action in instigating another grievance (made after his recommendation that she be discharged), and such surrounding circumstances as the recommended "promotion" to permanent status, the failure of higher management independently to investigate the grounds for discharge relied upon by Gallegos and his failure ever to warn her of the grave prospect of discharge. At bottom, General Counsel suggests, was Gallegos' fear that the processing of the grievance had brought to light his failure properly to administer sick leave and otherwise supervise his unit, thus making him vulnerable as a probationary supervisor to loss of status.

Respondent agrees that timing is of critical importance, and asserts that it tends to exonerate Respondent because so many of the reasons for termination were problem areas for Mills long before she chose to grieve. Thus, she had no known association with the Union when Gallegos deemed it necessary to put her on leave restriction; her poor attitude about the indebtedness letters (that it was her business and not IRS') likewise pre-dated the grievance; all of it began before, and remained unremedied after the grievance, and was supplemented by her telling her supervisor to go to hell. On such a record, given Mills' probationary status, Respondent argues it was not simply justified but was required to separate an employee who had failed to demonstrate her suitability for career tenure.

Given the many-pronged nature of the General Counsel's effort to demonstrate that the reasons given are pretexts, and that the circumstances require that an inference be drawn of unlawful motivation, it is perhaps most sensible to address each of the General Counsel's major contentions as he advances them.

A. The Termination Action Letter

The General Counsel notes that the letter, and the Gallegos recommendation, were issued without warning to Mills. This surprise was underscored, it is asserted, "by the failure of the evidence to establish that Gallegos advised Mills of her progress on February 28, 1985, at the tenth month of her probationary period, as required by Article 31 . . . of the applicable Collective bargaining agreement." Such failures are said to be indicative of pretext. The short answer regarding compliance with contract provisions is that we simply do not know, on this record, whether any progress meeting ever occurred. The failure of the evidence to establish that such a meeting did not occur is a failure of the prosecutor and hence provides no basis for drawing an inference adverse to Respondent. As to notice, it is clear that Mills knew of the potential for trouble resulting from her Leave Restriction letter. There is, however, no indication that she was given to understand that her indebtedness letters were an important issue, even after she twice made it clear that it was her personal business and no concern of IRS. She had on the last occasion said she would take care of the problem, and there is no indication she was thereafter pressured, or that Gallegos even followed through on his obligation to see that acknowledged debts are discharged. Perhaps she should have been warned that discharge was in the offing six weeks or so before her probationary year ended, but Respondent by then had ample reason not to permit a brief period of reform following a warning to interfere with its decision that she should be terminated. This is not a case, as are those relied upon by General Counsel, where the evidence of unlawful purpose is so strong as to make the absence of warning so significant a factor.

B. The Timing of Gallegos' Letter

General Counsel relies heavily on the fact that Gallegos recommended discharge when the grievance went beyond his control, had been amended, and became the subject of an unfair labor practice charge, waiting a full six days after the "insolence" of the go-to-hell incident. I find this "patience", or "slow-burn" after this incident puzzling, especially in view of his apparent acceptance of it at the time. I am unpersuaded, however, that Mills' apology took any real sting from the event, for it was by her own version an ambiguous one.

The problem with timing here, aside from the lack of immediate reaction to the "insolence", is that Mills was in real difficulty before she grieved and that the problems did not thereafter cease. Were it clear beyond doubt that her removal was merited, indeed required by conscientious application of the regulations governing probationary employees, all the elements of "suspicious" timing would still be present. They are, of course, unavoidable where the person threatened by potential discipline thereafter engages in protected activity and the agency stands firm in its conviction to impose discipline should the problem remain uncorrected or worse. Thus, aside from my misgivings about the lapse of time between the "insolence" and the letter, I do not accord any weight to the inevitable fact that the recommendation of discharge followed soon after the protected activity. In addition to its inescapable aspect (if one assumes lawful reason existed), it is also to be noted that the probationary year was coming to a close. Respondent could avoid application of the theory that such timing is indicative of guilt only by waiving its right or duty to take timely action against Mills.

C. Tardiness as a Basis for Termination

General Counsel asserts that the record will not support the claim that this was a real reason, and that Gallegos' testimony in this respect is inconsistent "to the point of farce". He focuses in particular on the claimed absence of documentation of tardiness during the time preceding the leave restriction, the unreasonableness of the AWOL on January 30 when Mills was sick, the fact that the March 7 AWOL had been removed before he relied upon it, and the fact that his response to the grievance and his statement to Richardson indicate that, from February 7 to 27, Mills attendance and timeliness indicated that leave restriction was working.

I have found that the leave restriction was not imposed without good reason, and that Gallegos had called for verification of her January illness from the Nurse's office but did not get it. As to the tardiness issue, she was, in fact, again late on March 5, and even her version of their conversation on March 14 (after the recommended termination) indicates that she was willing to live with the leave restriction and would try to become a good employee, strongly suggesting that the problem had not vanished. Acceptance of the General Counsel's argument that Gallegos harshly and arbitrarily issued the leave restriction letter and imposed AWOL for a known absence due to illness and tardiness due to car troubles only serves to undercut his case. If this new supervisor was so unfair and capricious in his treatment of Mills before she grieved, it becomes more difficult reasonably to draw inference that similarly harsh and "indefensible" treatment after that event is inexplicable unless related to the protected activity.

While there is some inconsistency between the imposition of AWOL on March 5, based in part on tardiness for the prior ten working days, and the statement in the grievance response that the leave restriction had been working, even Mills admits she was again late on that day, and there were at least four working days between those events. Nor did his grievance response say she was perfectly punctual. It said only that the leave restriction should be kept because he felt it was working.

D. The Indebtedness Letters

The document terminating Mills spoke to such letters and to her "attitude". Gallegos' recommendation that she be terminated actually said that her tardiness and excessive leave usage did not alone warrant termination, but that such action was warranted when one also considered two "recent" insubordinate acts: the go-to-hell incident on March 5 and her statement concerning indebtedness that it was "none of mine or IRS's damn business what she did on her own time or with her personal life". The record (Resp. Exhs. 2 and 3) indicates that she told him it "wasn't . . . (his) or IRS's business what she did outside of work" on November 13 and that she, on January 31, again "insist(ed) her personal life is her business". The most recent remark was six weeks old.

I do not read Gallegos' letter as indicating that receipt of letters of indebtedness alone was a consideration in his recommendation. Rather it was the "insubordination" they occasioned. The letter of termination does include them, and it seems clear that Phipps found such letters and Mills' attitude about them to be sufficient basis for discharge. It is also clear that neither Gallegos or any other manager aggressively followed up on the situation. That of course does not remove the element of attitude or insubordination.

E. Insolence as a Basis for Mills' Termination

I have already indicated that I find it puzzling that Gallegos took six days before he responded, in a way one might expect, to her statement that he go to hell. Nevertheless, it is no trifling matter, and I have rejected General Counsel's contentions that he set the stage for such language by saying "damn" and that she truly apologized. Slow burns do occur, and upsetting matters do accumulate. Nor is there any indication, as General Counsel argues, that Gallegos saw his "control" over the grievance process slipping away and that he feared disclosure of his improper leave practices. Such is sheer speculation. It may have motivated him. One cannot avoid suspicion. But there is no evidence that he feared that the grievance would cause his downfall, and the two managers above him in fact very strongly supported him. He was somewhat conciliatory, granting a part of the grievance.

There remains the statement Gallegos made sometime after Mills received the letter terminating her. He asked Mills what he was to think of her instigating another grievance against him. It is not alleged to be a violation, but is argued to be indicative of a discriminatory purpose. We do not know whether she responded. Suffice it to say that it raises the level of suspicion even more, but there is a limit to what may reasonably be inferred from such a statement. It is isolated. Gallegos did not otherwise, nor did any other manager indicate in any way that the grievance would cause her trouble. His response to the grievance at the first step was arguably reasonable, for he lifted the AWOL for the second tardiness caused by lack of gasoline. While the remark sounds in his unhappiness with her presenting him with yet another grievance, we are not so naive as to expect supervisors to welcome them. While they tread on dangerous ground when they express such feelings, the law does not proscribe disappointment or anger. It proscribes retribution. The supervisor may not consider such protected activities when he assigns work, rates an employee, recommends discipline, etc. I am not persuaded, on this record, that this single expression of disapproval or perhaps disbelief is enough to taint his recommendation.

In sum, Mills was a troublesome employee long before she grieved. She was, it is important to remember, a probationary employee nearing completion of her year. While her performance as such was very good, her attendance and punctuality were not. Her attitude about the indebtedness letters was poor. Her telling her supervisor where to go invited trouble, and her apology was less than full. There is no clear-cut expression of hostility to the Union or to those who use the grievance procedure. The treatment of her was arguably unfair, but it was very vigorously argued to have been very unfair months before the grievance was filed. The time was ripe for Respondent to decide whether Mills had demonstrated the fitness to acquire permanent status and the protections that surround such status. It did so, notwithstanding the presence of a grievance which could complicate matters. While the case is not free of suspicious elements, I conclude that the General Counsel has not demonstrated, by a preponderance of the evidence, that Respondent was motivated by illegal considerations in deciding to terminate this probationary employee. Such a finding would require that I pile inference on inference.

Based on these findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

IT IS HEREBY ORDERED, that the Complaint in Case No. 7-CA-50347 be, and it hereby is, DISMISSED.

Louis Scalzo

LOUIS SCALZO
Administrative Law Judge

Dated: July 28, 1986
Washington, D.C.

[6-CA-60050]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE,
MARYLAND, AND SOCIAL SECURITY
ADMINISTRATION, ALBUQUERQUE
DATA OPERATIONS CENTER,
ALBUQUERQUE, NEW MEXICO

Respondent

and

Case No. 6-CA-60050

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3512

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on August 13, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., September 23, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[6-CA-60050]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE,
MARYLAND, AND SOCIAL SECURITY
ADMINISTRATION, ALBUQUERQUE
DATA OPERATIONS CENTER,
ALBUQUERQUE, NEW MEXICO

Respondent

and

Case No.: 6-CA-60050

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3512

Charging Party

Christopher J. Ivits, Esquire
For General Counsel

Irving L. Becker, Esquire
For Respondent

Ollieta A. Lee
For Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on November 6, 1985, by the American Federation of Government Employees, AFL-CIO, Local 3512, (hereinafter called the Union or Charging Party), a Complaint and Notice of Hearing was issued on February 18, 1986, by the Regional Director for

Region VI, Federal Labor Relations Authority, Dallas, Texas. The Complaint alleges that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, and Social Security Administration, Albuquerque, New Mexico, (hereinafter called the Respondent or SSA), violated Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by making veiled threats on two occasions to a bargaining unit employee because the employee had contacted and/or requested union assistance.

A hearing was held in the captioned matter on March 24, 1986, in Albuquerque, New Mexico. All parties were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on May 27 and May 22, 1986, respectively, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact[1]

At all times material herein, Respondent has recognized the American Federation of Government Employees as the exclusive collective bargaining representative of a nation-wide consolidated unit of nonprofessional employees. The unit includes, among others, the employees at Respondent's Albuquerque Data Operations Center. Local 3512 is the American Federation of Government Employees' representative at the Albuquerque Data Operations Center.

Ms. Susan Granger, a bargaining unit employee, was employed by Respondent as a Data Transcriber at Respondent's facility in Albuquerque, New Mexico from January 1980 to November 1985.[2] For the period 1982 to 1985, her immediate supervisor was Ms. Dina Roniger. Ms. Granger resigned her position in November 1985 due to the fact that she felt she had been treated unfairly and harassed.[3] Ms. Granger who was a member of the Union in 1980, resigned from the Union during the second year of her employment and did not rejoin the Union.

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[1] Most of the facts are not in dispute. However, where a dispute does exist in the respective testimony of Ms. Granger and Ms. Roniger, I have credited Ms. Granger.

[2] Ms. Granger was hired as a "seasonal" employee and appears to have worked from "December 'til August" in the final year of her employment.

In July 1985, Ms. Granger began to experience pain and loss of mobility in her fingers. With, Ms. Roniger's permission Ms. Granger sought medical attention from Respondent's nurse and doctor. After seeing the nurse, she subsequently saw a doctor on Monday, July 12, 1985. Both the nurse and doctor advised her to seek further medical treatment. Ms. Granger then went to the Lovelace Clinic "urgent care center," where the doctor, after taking x-rays, diagnosed her condition as possible tendonitis, and provided her with medication. The urgent care doctor advised Ms. Granger to seek further medical care and gave her a form which stated her diagnosis and advised Ms. Granger how to care for her hand. Upon Ms. Granger's return to work she presented the form to Ms. Roniger.

The following day, Ms. Granger went to see her own primary care physician who diagnosed her condition as tendonitis and the onset of carpal tunnel syndrome. Ms. Granger's doctor also advised her that her injury was work related and that her supervisor should send workmen's compensation papers to him. Following his suggestion, Ms. Granger advised Ms. Roniger about the doctor's suggestions with regard to workmen's compensation. Ms. Roniger, in turn, advised her to see the Social Security nurse. Ms. Granger did see the nurse, who filled out the appropriate paperwork and advised her to give Ms. Roniger the papers so that Ms. Roniger could fill out her appropriate portion. Ms. Roniger did fill out the papers and had Ms. Granger take them to Personnel. Ms. Granger received no response from Personnel and continued working with her injured hand. After waiting what seemed like a month, Ms. Granger sought the assistance of the Union.

Thus, according to the credited testimony of Ms. Granger, around August 1, 1985, she went to the Union with questions concerning her injured hand, her rights to workmen's compensation, and her working conditions. She met with Ms. Katie Garcia-Wade, Vice President of the Union. During this meeting, Ms. Granger explained her situation to Ms. Garcia-Wade and asked Ms. Garcia-Wade what she could do. Ms. Garcia-Wade told her that she would set up a meeting with Ms. Roniger, Ms. Granger's supervisor, to discuss the situation and work it out.

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[3] Her resignation is not an issue in the case.

Shortly after her meeting with Ms. Granger, Ms. Garcia-Wade contacted Ms. Roniger, arranged a meeting with her, and informed her that Ms. Granger's hand had been injured. Ms. Roniger told Ms. Garcia-Wade that she was not aware that Ms. Granger's hand had been injured. During the meeting, Ms. Garcia-Wade and Ms. Roniger discussed Ms. Granger's ability to adequately perform her duties, Ms. Granger's production, and the possibilities of placing Ms. Granger in another position.

After her meeting with Ms. Garcia-Wade, Ms. Roniger called Ms. Granger to her desk, which was in clear view of all the other employees in the unit. Ms. Roniger began "yelling" at Ms. Granger. According to Ms. Granger's credited testimony, Ms. Roniger screamed at her, "Why did you go to the Union. You didn't have to go to the Union. I didn't know you were in pain. You should have talked to me about it first." Ms. Roniger was very upset and yelling so loudly that her screams could be heard by at least one employee who was wearing her "headset."[4] Ms. Granger began crying and told Ms. Roniger that she was just trying to take care of herself and wanted to know what she was supposed to do.

Following this meeting, Ms. Granger returned to the Union during her break and spoke to Ms. Garcia-Wade. Ms. Granger, who at the time was crying and upset, told Ms. Garcia-Wade, "If talking to Dina is going to get her all upset like that . . . she was yelling at me and everything .. . I'd rather you didn't talk to her . . . I just want to find out what's going on with my hand .. . I don't want to upset her. I wish you could do it without her getting mad at me." Ms. Garcia-Wade advised her that if there were any further meetings that Ms. Granger should request that Ms. Garcia-Wade be allowed to attend. Ms. Granger then returned to her work site.

Later that same day, Ms. Roniger called Ms. Granger back to her desk. Pursuant to instructions from the Union, Ms.

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[4] "Headset" is defined in the record as ear phones.

Granger asked for a Union representative. Ms. Roniger replied that that "wasn't necessary because we were two grown adults and we could talk to each other and she was concerned about me as much as the Union was." During this meeting, Ms. Roniger told her that she was going to set up an appointment with Ms. Julie Blossom, Ms. Granger's second level supervisor. Ms. Roniger then told Ms. Granger that she would have to go on leave without pay due to her injury and that there was no alternative. Following this meeting, Ms. Granger returned to the Union office where she met with Ms. Garcia-Wade and Ms. Ollieta Lee, Chief Steward. Ms. Granger, who was again crying, informed Ms. Garcia-Wade what had occurred, and that she felt Ms. Roniger was attempting to force her to take leave without pay. Ms. Granger told Ms. Garcia-Wade "I didn't realize that going to the Union was going to get me in trouble. I didn't realize that now, because of this investigation, that, you know, you went over there with Dina, that it was going to cause me to have to go on leave without pay." Ms. Garcia-Wade told her not to worry about the situation, as she would take care of it. Ms. Garcia-Wade further advised Ms. Granger to return to work the next day.

The following day, Ms. Granger did return to work and was again called by Ms. Roniger to another meeting. Again, Ms. Granger asked for a Union representative. Ms. Roniger told Ms. Granger that she did not want Ms. Granger to have one. During this meeting, Ms. Roniger told Ms. Granger that she had misunderstood her the previous day and that she did not mean to leave Ms. Granger with the impression that she was required to take leave without pay. Rather, Ms. Roniger told Ms. Granger that leave without pay was an option. Ms. Granger did, on a later date, meet with Ms. Julie Blossom concerning her situation. Aside from discussing her medical condition and the variety of options open to Mr. Granger, little was accomplished at this meeting. Eventually, Ms. Granger decided to go on leave without pay. Ms. Granger's workmen's compensation claim was eventually approved.

Discussion and Conclusions

The General Counsel, relying primarily on the Authority's decision in Navy Resale System Field Support Office, 5 FLRA 311, takes the position that under all the circumstances present herein Respondent violated Section 7116(a)(1) of the Statute when Ms. Roniger loudly berated Ms. Granger for seeking the assistance of the Union in connection with the processing of her workmen's compensation claim. With respect to the second conversation wherein Ms. Granger first asked for a Union representative, the General Counsel takes the position that Ms. Roniger's statement that Ms. Granger did not need Union representation since they were adults constituted a further violation of Section 7116(a)(1) since it reaffirmed her earlier veiled threat that it was best not to get the Union involved.

The Respondent on the other hand urges dismissal of the complaint on the ground that Ms. Roniger's statements were merely expressions of opinion unaccompanied by any threats or promises of benefit. In support of its position Respondent relies in the main on the Authority's decisions in Oklahoma City Air Logistics Center, Tinker AFB, Oklahoma, 6 FLRA 159 and United States Customs Service, San Francisco, California, 18 FLRA 195.

While it is true as contended by the Respondent that in Oklahoma City Air Logistics Center and U.S. Customs Service, supra, the Authority found that the mere expression of an opinion such as "a union representative is not necessary" unaccompanied by any threats or promises of benefit did not constitute a violation of Section 7116(a)(1) of the Statute, we do not have such an innocuous factual situation present herein.

If Ms. Roniger had merely summoned Ms. Granger up to her desk after the meeting with the Union and confidentially made the remarks attributed to her, I would agree with the Respondent that dismissal of the complaint is in order. However, such is not the case, since the record evidence established that following her meeting with the Union Ms. Roniger called Ms. Granger up to her desk and in front of Ms. Granger's fellow employees proceeded to loudly berate her for seeking assistance from the Union.

Viewing the statement in the context it was made, I find in agreement with the General Counsel that Ms. Roniger's statement had a tendency to coerce not only Ms. Granger but also her fellow employees. Thus, I find that an employee could well draw the inference that seeking Union assistance could result in a distasteful confrontation with Ms. Roniger.[5] As noted by counsel for the General Counsel the

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[5] Cf. Navy Resale System, supra, wherein a similar statement uttered in anger was found to be coercive.

Authority has ruled that if an employee has to think twice before exercising a statutory right, the employee's statutory right has been interfered with. National Labor Relations Board, Region I, Boston, Massachusetts, 5 FLRA 622 at 634, Department of the Treasury, Internal Revenue Service, Louisville, Kentucky, 5 FLRA 398.

Turning now to Ms. Roniger's remarks in response to Ms. Granger's first request for a Union representative, I find contrary to the contention of the General Counsel that Ms. Roniger's statement that the presence of a Union representative "wasn't necessary because we were two grown adults and we could talk to each other and she was concerned about me [Ms. Granger] as much as the Union was", did not interfere with Ms. Granger's statutory rights. Thus, unlike her earlier statement to Ms. Granger, this statement was made out of the hearing of Ms. Granger's fellow employees and in an apparent normal speaking voice. As noted above, such statements of opinion unaccompanied by any threats or promises of benefit do not violate the Statute. To, infer that this statement was somehow related to the earlier statement made in a coercive manner and was a reaffirmation of such earlier statement in this writer's opinion stretches the imagination. It might well be argued that Ms. Roniger was attempting to atone for her earlier unwarranted outburst. Accordingly, it is recommended that this aspect of the Complaint be dismissed. Cf. Veterans Administration Medical and Regional Office Center, White River Junction, Vermont, 6 FLRA 381, 391; Army and Air Force Exchange Service, et. al., 8 FLRA 432, 435 and 436.

Having concluded that the Respondent violated Section 7116(a)(1) of the Statute by berating Ms. Granger in front of her fellow employees for seeking assistance from the Union, it is recommended that the Federal Labor Relations Authority adopt the following order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118 (a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations of the Federal Labor Relations Authority, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, and Social Security Administration, Albuquerque Data Operations Center, Albuquerque, New Mexico shall:

1. Cease and Desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by berating them in the presence of their fellow workers because they sought assistance from Local 3512, American Federation of Government Employees, AFL-CIO.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its Albuquerque Data Operation Center, copies of the attached notice, marked "Appendix", on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by an appropriate official of Respondent, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Such official shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's rules and regulations, notify the Regional Director, Region VI. Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: August 13, 1986
Washington, D.C.

[6-CA-60050]

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by berating them in the presence of their fellow workers because they sought assistance from Local 3512, American Federation of Government Employees, AFL-CIO.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: _________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202 and whose telephone number is: (214) 767-4996.

[9-CA-60082]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
WASHINGTON, D.C.
Respondent

and

GENERAL SERVICES ADMINISTRATION
AUBURN, WASHINGTON

Respondent

and

Case No. 9-CA-60082

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
COUNCIL 236, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on August 19, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., September 29, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[9-CA-60082]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

GENERAL SERVICES ADMINISTRATION .
WASHINGTON, D.C. .

Respondent .

and .

GENERAL SERVICES ADMINISTRATION .
AUBURN, WASHINGTON .

Respondent .

and . Case No. 9-CA-60082

AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
COUNCIL 236, AFL-CIO .

Charging Party .

. . . .

R. Timothy Sheils, Esquire
For the General Counsel

Mary Ann Pacacha, Esquire
For the Respondent

Before: ELI NASH, Jr.
Administrative Law Judge

DECISION

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101 et seq. (hereinafter called the Statute), as a result of an unfair labor practice Complaint and Notice of Hearing issued on April 18, 1986 by the Regional Director, Region IX, Federal Labor Relations Authority, San Francisco, California.

The Complaint alleges in substance that the General Services Administration, Washington, D.C. and General Services Administration, Auburn, Washington (hereinafter called the Respondent or Respondents) violated section 7116(a)(1) and (8) of the Statute, by refusing to comply with Arbitrator Zane Lumbley's October 26, 1985 award which required Respondents to assign Ms. Margaret Lien (hereinafter called Lien) an overall outstanding rating in her performance from June 1983 to May 1984 and from June 1984 to May 1985.

On or about May 6, 1986 Respondents filed an Answer. Thereafter on or about May 20, 1986 Respondents filed a "Response to Complaint and Notice of Hearing" to the complaint, admitting the allegations contained in paragraphs 1-7 of the Complaint including admitting that while Respondents filed exceptions with the Authority to the Lumbley arbitration award, no request for a stay of the arbitration award was made to the Federal Labor Relations Authority (hereinafter called the Authority). In paragraph 7 of its Answer, Respondents stated that it had not implemented the Lumbley arbitration award because, in its view, the award was not "final" because Respondents had filed exceptions to the Award even though no request for a stay of the award under section 7122(b) was made. Respondents further claimed that the Authority, in its response to requests for stays, has repeatedly stated that it was not an unfair labor practice to fail to implement an award which has been timely appealed.

The hearing originally scheduled for May 21, 1986 was postponed to July 15, 1986 in order to allow the parties to work out a Stipulation or Motion for Summary Judgment. Subsequently, on May 30, 1986 the General Counsel filed a Motion for Summary Judgment. The General Counsel contended that Respondents violated section 7116(a)(1) and (8) of the Statute by failing and refusing to comply with an arbitrator's award, in the absence of a stay while exceptions to the award were pending before the Authority. U.S. Soldiers' and Airmen's Home, Washington, D.C., 15 FLRA No. 26 (1984), AFGE, Local 3090 v. FLRA, 777 F.2d 751 (D.C. Cir. 1985), U.S. Soldiers' and Airmen's Home, Washington, D.C., 21 FLRA No. 44 (1986). Thereafter the Chief Administrative Law Judge pursuant to the rules and regulations issued an Order setting a briefing period and a further Order postponing the hearing indefinitely.

On June 27, 1986, Respondents filed a Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment. Respondent reiterated that it complied with the Authority's practice which existed at the time it filed exceptions to the arbitrator's award. Consequently, it argues that it would be inequitable to find that Respondents' committed an unfair labor practice merely because the Authority accepted the U.S. Court of Appeals for the District of Columbia Circuit's Order to issue a remedial order in AFGE, Local 3090 v. FLRA, supra. Furthermore, Respondents' argues that the Authority in GSA, Region 10 and AFGE, Council 236, 22 FLRA No. 8 (1986), issued June 6, 1986, found the Lumbley award was unlawful thereby making an order compelling compliance with the arbitrator's award unlawful, as it would be contrary to law.

Thereafter on July 3, 1986 the General Counsel filed a "Reply to Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment." Therein the General Counsel argues that retroactive effect should be given the Authority's decision absent special circumstances and that no such circumstances were present herein; and, that the Authority's decision in GSA, Region 10, supra, did not render moot the question of the appropriate remedy herein.

The parties appear to be in agreement that the matter can be resolved without a hearing.

Upon consideratión of the General Counsel's Motion for Summary Judgment, Respondents' reply thereto, and all the pleadings and attached materials, it seems that there is no geniune issue of material fact and that the General Counsel is entitled to Summary Judgment as a matter of law.

Findings of Fact

These findings are essentially the same as proposed by the Respondent in its Cross-Motion for Summary Judgment.

1. At all times material to this case, Respondent and the Union have been parties to a national collective bargaining agreement covering employees in an appropriate unit. The agreement includes, inter alia, a grievance procedure culminating in final and binding arbitration.

2. On or about October 31, 1984, in accordance with the provisions of the parties' national agreement, an arbitration was held before Arbitrator Zane Lumbley in the matter of the Lien grievance.

3. On or about December 31, 1984, Arbitrator Lumbley issued his opinion and award finding, inter alia, that Respondent, Region X had violated certain provisions of the

national agreement. Arbitrator Lumbley ordered Respondent, Region X, inter alia, to establish a set of appropriate performance standards relevant to all critical elements of the grievant's position and to reappraise the grievant.

4. On or about August 29, 1985, the parties invoked the continuing jurisdiction of Arbitrator Lumbley in order to resolve some remaining disputes.

5. On or about October 2, 1985, Arbitrator Lumbley issued his compliance opinion and award ordering that the grievant be given an overall rating of outstanding with respect to her performance.

6. Thereafter, on or about November 5, 1985, in accordance with the provisions of the Statute, Respondent filed its Exception to the Lumbley arbitration award with the Authority. No request for a stay of arbitration award was ever made.

7. At the time the Respondent filed its Exception to the Lumbley arbitration award, existing case law in U.S. Soldiers' and Airmen's Home, supra, held that an agency did not commit an unfair labor practice by noncompliance with an arbitrator's award to which an Exception has been timely filed, even though a Request for a Stay was not made. The Authority said:

> Conversely, where exceptions to an arbitrator's award have been filed under section 7122(a) of the Statute within the time limits specified in section 7122(b), such award by definition, has not become 'final and binding.' Since an agency is only required by section 7122(b) to 'take the actions required by an arbitrator's final award' (emphasis added), a failure to comply with the award until the pending exceptions have been resolved by the Authority cannot constitute noncompliance with that section and therefore is not a violation of section 7116(a)(1) and (8) of the Statute. As noted by the Judge, a contrary conclusion could result in the Authority's reaching the conflicting conclusions that an agency has committed an unfair labor practice by refusing to comply with an arbitrator's award and the issuance of an

> affirmative order requiring compliance, on the one hand, and, on the other hand, that exceptions to the same award are meritorious and that the award must be set aside under section 7122(a)

8. A little over two weeks later, on November 22, 1985, the U.S. Court of Appeals for the District of Columbia vacated the Authority's Order AFGE, Local 3090, supra, and remanded the case for further proceedings consistent with the Court's opinion.

9. On April 17, 1986, the Authority accepted the D.C. Circuit's opinion in AFGE, Local 3090, supra, as the law of the case and correspondingly issued a remedial order.

10. On April 18, 1986, the General Counsel issued a Complaint and Notice of Hearing in this matter.

11. Respondent in good faith relied on settled case law issued by the Authority when it filed its Exception to Arbitrator Lumbley's opinion and award on November 5, 1985, without an accompanying Request to Stay the Arbitrator's Decision.

12. Respondent maintains that special and extenuating circumstances are present in the instant case, since the Respondent relied on and was misled by Authority case law interpreting an agency's obligations under Section 7122(b) of the Statute. Thus, Respondents failed to Request a Stay of the arbitrator's award at the time it filed its Exception to that award. Furthermore, under the Authority's Rules and Regulations, a Request for a Stay must be made in conjunction with and as part of an exception to an arbitrator's award.

13. In addition, Respondents maintain it would have experienced irreparable harm if forced to comply with the arbitrator's award prior to review of the award by the Authority. In this regard, Respondent, Region X was planning a reduction-in-force to occur no later than September 30, 1986. The revised Office of Personnel Management regulations on reduction-in-force contained in 5 CFR Part 351 provide that an employee's performance rating is a factor in determining an employee's place on the retention register. See 5 CFR 351.502. An employee may be entitled to additional service credit for performance under Section 351.504. Thus, if Respondents' had complied with the award by giving Lien an outstanding rating prior to the

Authority's decision and had conducted the proposed reduction-in-force the Agency would have been forced to reconstruct the reduction-in-force when and if, the arbitrator's award was reversed on appeal. Since Lien would then only be entitled to a highly successful rather than an outstanding rating, the Respondents would have been forced to make appropriate corrections affecting other employees.

14. On June 6, 1986, the Authority issued a decision on the Agency's exception to Arbitrator Lumbley's award. General Services Administration, Region 10 and American Federation of Government Employees, Council 236, Case No. O-AR-1051, 22 FLRA No. 8 (June 6, 1986). The Authority overturned the award stating that the Arbitrator "in determining that the grievant deserved an overall rating of 'outstanding,' necessarily conducted an independent evaluation of the percentage of time that the grievant's performance exceed established standards and clearly substituted his judgement for that of management as to what the grievant's performance evaluation . . . should have been." Id. at 5. Thus, the Authority concluded that the Award contravened Section 7106(a) of the Statute and prior Authority decisions. Id. It ordered that the last sentence of the Award requiring Respondents to give the grievant an "outstanding" rating be struck and replaced with an order compelling reevaluation of the grievant's performance. Id.

15. In GSA, Region 10, supra, the Authority specifically found that the performance appraisal at issue was not the type which would permit an arbitrator to determine in an objective, nondiscretionary and mechanistic manner whether the grievant was entitled to a different rating. Id. at 5. Nevertheless, the Union has subsequently proposed to challenge any performance appraisal which rates the grievant below outstanding. The Union argues that since the Authority did not expressly modify the first portion of the arbitration award that portion should be given effect. Since it appears that the Authority's decision may contain a technical oversight, on June 16, 1986, Respondent filed a motion to amend the order for clarification of the scope of the Authority's modification of the award.

16. According to Respondent, the Authority's reversal of the arbitrator's award, in effect, renders moot the General Counsel's request for a cease and desist order. Since the Authority has declared the award unlawful, an order compelling compliance would be contrary to law.

17. The Respondent has offered to fully comply with the Award as modified by the Authority in GSA, Region 10, supra, and as further modified pursuant to the Agency's Motion to Amend Decision.

18. The Respondent complied with the Authority's practice extant at the time of filing its exception to the arbitrator's award. It will continue to comply with procedures established by the Authority to stay arbitration awards in the event that it files future exceptions to arbitrators' award.

19. Respondent maintains that in light of the Authority case law in effect at the time that the Respondent filed its exception to arbitrator's award and the Authority's subsequent disposition of the case on appeal, it would be inequitable to find that the Respondent committed an unfair labor practice as alleged by the General Counsel.

Conclusions

In agreement with the General Counsel, it is found that Respondents' Cross-Motion for Summary Judgment raised two issues, retroactive application and whether the Authority's modification of the Lumbley award rendered the requested remedy in the matter moot.

With regard to the issue of retroactive application it must be recognized that almost all adjudication whether judicial or administrative involves some degree of retroactive law making. Moreover, when a party has relied to his detriment, on an administrative decision, in order to obtain equitable results, such as argued by Respondent, balancing factors should be applied. In some instances, however, the price of such protection may be too high. Possibly for that reason we find courts applying retroactivity in different fashions. Compare NLRB v. Gary F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952), and NLRB v. Kolvitz, 193 F.2d 8 (1st Cir. 1951).

It appears, however, that the major considerations as to whether retroactivity should be applied are reliance and detriment. In this case Respondents' relied on past Authority precedent although it should have been aware that a few weeks after it filed exceptions to the Lumbley award relying on the U.S. Soldiers' and Airmen's Home case, supra, that case, on which it placed its reliance, was vacated by the D.C. Circuit Court of Appeals. Not only was it vacated and remanded, but the Authority was directed to take further proceedings consistent with the Court's decision. That decision left no doubt that the filing of a stay was required. In such circumstances, reliance alone would not be sufficient to find Respondents could have been comfortable in relying on the Authority's prior decision.

Even though Respondents relied on the prior Authority decision which was remanded and modified consistent with the Court's directive it failed to prove that it suffered any detriment. Respondent broadly objects that to find an unfair labor practice would be inequitable. However, as the General Counsel points out, Respondents' suffered no irreparable harm or unjust burden because while it planned a reduction-in-force the reduction-in-force did not take place. Furthermore, a reduction-in-force based on erroneous ratings would not affect Respondents, but only the employees involved. In any event, since there was no reduction-in-force Respondent cannot claim that an undue burden was created. Since no unjust burden was shown by Respondents its argument concerning retroactive application is rejected. See United States Steel Corp. 268 NLRB 1187 (1984); see also, Belleville News Democrat, Inc., 195 NLRB 431 (1972).

Accordingly, it is found that Respondents argument that the rule preventing retroactive application should be followed is rejected.

Respondents also contended that the Authority's decision in General Services Administration, supra, "renders moot the General Counsel's request for a cease and desist order". First, Respondents are incorrect in asserting that the requested order is contrary to law because the alternative language in the proposed order expressly addresses and incorporates the Authority's modification of the Lumbley award. Second, the proposed order also requires that Respondents post a Notice to Employees, and even though Respondents claim that they will comply with the Authority's modified award, such compliance does not end the need for the requested posting. As the court noted in NLRB v. Hiney Printing Co., 733 Fed. 1170, 1171 (6th Cir. 1184):

> The Statute clearly calls for the posting of notices as a part of the enforcement procedure of the NLRB. NLRB is charged with serving the public interest to enforce labor relations rights which are public, not private rights. As the Board argues, the posting of notices serves two purposes: advising the employees that the NLRB has protected their rights, and preventing or deterring future violations.

Such a rational is equally applicable to cases arising under the Statute. Thus, the requested order requiring both compliance with the modified arbitration award and the posting has not been rendered moot because the order will not only assure Respondents' compliance with the modified award but also will deter future violations and inform employees of their statutory rights.

Accordingly, the General Counsel's Motion for Summary Judgment is granted and it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the General Services Administration, Washington, D.C. and the General Services Administration, Region X, Auburn, Washington shall:

1. Cease and desist from:

(a) Failing to comply with the provisions of section 7122(b) of the Federal Service Labor-Management Relations Statute by refusing to implement an arbitrator's award notwithstanding that no request for a stay of the arbitration award had been filed pursuant to section 2429.8 of the Authority's Rules and Regulations.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply fully with the award of Arbitrator Zane Lumbley dated October 26, 1985, to the extent that such compliance has not been previously effectuated.

(b) Post at its facility where employees in the bargaining unit are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official of Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash Jr.

ELI NASH, Jr.
Administrative Law Judge

Dated: August 19, 1986
Washington, D.C.

[9-CA-60082]

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to comply with the provisions of section 7122(b) of the Federal Service Labor-Management Relations Statute by refusing to implement an arbitrator's award notwithstanding that no request for a stay of the arbitrator's award had been filed pursuant to section 2429.8 of the Authority's Rules and Regulations.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply fully with the award of Arbitrator Zane Lumbley dated October 26, 1985, to the extent that such compliance has not been previously effectuated.

____
(Agency or Activity)

Dated: __________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 9, whose address is: 530 Bush Street, Room 542, San Francisco, CA 94108 and whose telephone number is: (415) 556-8106.

(7-CA-50580]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 7-CA-50580

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1592, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on August 11, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., September 30, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[7-CA-50580]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE,
OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1592, AFL-CIO

Charging Party

Case No. 7-CA-50580

Clare A. Jones, Esq.
For the Respondent

Cathy A. Auble, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the above captioned Charging Party against the above captioned Respondent, the General Counsel of the Authority, by the Regional Director for Region VII, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) of the Statute when two of its supervisors made statements to an employee relative to that employees' filing grievances.

A hearing on the Complaint was conducted in Ogden, Utah at which Respondent and the General Counsel were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both counsel and have been carefully considered.[1]

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein referred to as AFGE) has been the exclusive collective bargaining representative of a nationwide unit of employees employed by Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio including various employees located at Hill Air Force Base, Utah (herein referred to as Hill AFB). AFGE's Council 214 is an affiliate and agent of AFGE and Local 1592 is an affiliate and agent of Council 214. Employees at Hill AFB are represented by AFGE through Local 1592 (herein the Union).

On June 18, 1985 Gregory Byrne, a WG-9 unit employee who began his employment at Hill AFB in April 1980, filed a grievance alleging non-selection for a promotion. On that same day Byrne, represented by Joseph Celli, Chief Steward at Respondent's Directorate of Supply, met with Lynn Coy, Chief, Repair Support Section, Directorate of Maintenance, Byrne's third level supervisor, to discuss the matter.[2] During this meeting while discussing Byrne's qualifications for the promotion Coy indicated, *inter alia*, that Byrne's quality of work was low during the relevant appraisal period. Coy revealed that he obtained this information from Karl Johnson who had been Byrne's first level supervisor up to a few days prior to the meeting. Byrne challenged this assertion and the grievance was unresolved when the meeting concluded. Byrne acknowledged that everyone spoke "fairly level headed" during the meeting.

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[1] Counsel for the General Counsel's unopposed motion to correct the transcript as to minor matters is hereby granted.

[2] This step in the grievance procedure is designated as an "Informal Discussion."

According to Byrne, about twenty minutes after the meeting ended he was working at his machine when Coy approached him and asked Byrne if he could talk to him. Byrne responded he would like to have his Union representative present if Coy was going to say anything about the grievance. Coy told Byrne it was "O.K.," the conversation would be "off the record." Coy then asked what he had ever done to Byrne to make him want to file "these grievances."[3] Byrne testified he told Coy that either Johnson or Coy was lying to him, pointing out that some years ago when he was a candidate for a WG-9 position, Johnson initially gave Byrne a good appraisal but the appraisal was subsequently lowered. Byrne asked Coy why he didn't get the promotion and Coy responded that Byrne was not in "good shape" at that time because of his leave record. Byrne said he heard the other candidate got the promotion because of his friendship with the Division Chief and asked Coy if that was true. Coy replied he couldn't help what happened in the past and told Byrne ". . . this grievance isn't going to do you any good" and ". . . if you do have any other problems in the future, don't go to the union, but come to me first." This concluded the conversation.

Coy testified to meeting with Byrne and Celli on June 18 to discuss Byrne's grievance. Coy's position at the meeting was that Byrne's failure to receive a promotion was not a grievable matter. Coy also acknowledged later talking to Byrne at his worksite but testified the conversation occurred after Byrne had filed another grievance on June 19, alleging his prior supervisor, Johnson, had made "malicious and unfounded allegations" when, as Coy had indicated on the prior day, Johnson said Byrne's quality of work was low. Coy testified he approached Byrne at his worksite to "reconfirm" his good rapport with Byrne and because he felt the second grievance evidenced a "misunderstanding" as to what Coy had said during the grievance meeting on the prior day. In any event, according to Coy in his conversation with Byrne at his worksite Byrne indicated he wanted to contact the Union and Coy told him that was not necessary, since the discussion was "on a informal basis." Byrne expressed unhappiness over his prior appraisal and Coy indicated it had nothing to do with the current issue.

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[3] On cross-examination Byrne acknowledged that Coy might have only referred to "grievance" since only one grievance had been filed by Byrne at this time.

Coy told Byrne, in essence, that if Byrne had a problem, come to him and he would at least be willing to listen to him. Coy denied telling Byrne it wouldn't do him any good to file grievances and responded in the negative when asked if he told Byrne if he had a problem he was not to go to the Union but instead go to his supervisor.

As stated above, Byrne filed a second grievance on June 19, 1985. With regard to that grievance, Byrne and Chief Steward Celli met in Coy's office with Coy and Byrne's new first line supervisor, Kent Bambrough, in an effect to resolve the matter. The meeting was not productive and Bambrough invited Byrne and Celli back to his office for further discussion. with regard to the meeting in Bambrough's office, Byrne testified on direct examination:

> Mr. Bambrough said "Greg" -- he said, "I don't want to see you get hurt and get in any trouble." He said, "My dealings in the past, filing these grievances is going to -- only going to bring management down on you and it's not going to help you in any way. It can only hurt you."
>
> He said that if I'd just drop these grievances and forget about what happened on Karl Johnson's crew and how I'd been treated over there, and now that I'm working for him, as a new supervisor, to give him a chance to give me a chance to get a better appraisal that -- and keep my nose clean and do him a good job, that he would see that I got a good promotion.
>
> Q Was anything else said at that meeting?
>
> A Not that I recall.

On cross-examination Byrne varied his testimony somewhat testifying that Bambrough said:

> "Greg, I'd hate to see you get in trouble" as far as my career went, and as far as management coming down on me for filing these grievances. That it will only do me harm instead of good.

Later on cross-examination Byrne testified that Bambrough told him:

> "Greg, I hate to see your career go down the tube or you get in trouble as far as you going anywhere in your career as being employed out there at Hill Field by filing these grievances."

In his affidavit given to an agent of the Authority on September 17, 1985 as part of the investigation conducted with regard to the unfair labor practice charge filed in this matter on August 29, 1985, Byrne stated, inter alia:

> "Bambrough said that, in his dealings with people in the past, people who bucked the system didn't get anywhere but instead had gotten into trouble with management, but he didn't say anything about my career being affected by my having filed these grievances."

Chief Steward Celli testified that during the meeting he attended with Byrne and Bambrough on June 19, 1985, Bambrough told Byrne:

> ". . . he'd really hate to see his career go down the tubes and he'd hate to see him lose his job and stuff over these nit-picky grievances; and that all these grievances was going to do was get him in trouble."

Supervisor Bambrough, whose testimony I credit,[4] testified on direct examination as follows regarding his conversation with Byrne on June 19:

> A He'd been filing these grievances against Karl -- I don't know, these grievances like his appraisal was too low, which happened three of four months ago, and Karl had been spreading rumors around about his quality of work being low. Me, I just thought these

---

[4] I was particularly impressed with Bambrough as a witness both as to his demeanor and his recollection of what transpired.

nit-picky things. So I called Mr. Byrne and Mr. Celli, and I told Mr. Byrne, I said, "Greg, you're working for me now, why don't you forget about all these things that happened with Karl. If you do a good job, I'll see that you get treated fair." I said, "It's been my experience in the past if you start bucking management, it's not going to do you any good down the road." Them was the only statements I made to Mr. Byrne. In fact, Mr. Celli at that time even turned to me and said, "Yeah, why do you think I'm such low grade, I've been bucking them ever since I walked in the door." We were just sitting there talking as three people. I had no idea I was involved in this thing. In fact, I told him I didn't want to get involved. I said if you got heartburn against Mr. Coy and Mr. Johnson, and you feel like you're getting mistreated then have at it, I don't want to get involved.

Q Let me show you what has been previously marked as General Counsel's Exhibit 1(C), (the Complaint, infra) in particular paragraph 11. Would you just read that particular paragraph to yourself, and then I'll ask you some questions.

With reference to paragraph 11(A), it's alleged that you said that you hated to see Byrne's career go down the tube over the grievance that had been filed.

A No.

Q Did you say that or any words to that effect?

A No, like I mentioned earlier, filing this nit-pick grievance, it's been my experience that win, lose, or draw, they're not going to help you with management down the road.

That's as close I can recall the statement I made to him.

Q How about -- did you say to him that you didn't want to see the employee lose his job?

A No, I know better than that. You're not going to lose a job over a simple grievance.

> Q How about (C) the grievance was going to get the employee into trouble?
>
> A No, I didn't make that statement either.

On cross-examination Bambrough stated that he was simply attempting to give Byrne, a new employee under his supervision, what he thought was "good advice."

Discussion and Conclusions

The Complaint alleges, and Counsel for the General Counsel contends, that Respondent violated section 7116(a)(1) of the Statute by statements made to Byrne at his work place by Repair Support Section Chief, Coy on June 18, 1985 and Supervisor Bambrough's conversation with Byrne on June 19 in Bambrough's office. More specifically, the Complaint alleges:

> "10. On or about June 18, 1985, Respondent, through Coy, at its Hill Air Force Base, Utah facility, told (Byrne) in words to the effect that it would not do (him) any good to file grievances, and that if he had a problem he was not to go to the Union but was instead to go to the supervisor.
>
> "11. On or about June 19, 1985, Respondent, through Bambrough, at its Hill Air Force Base, Utah facility, told (Byrne) words to the effect: (a) that he hated to see (Byrne's) career go down the tubes over the grievances filed by (Byrne); (b) that he didn't want to see (Byrne) lose his job; and (c) the grievances were going to get (Byrne) into trouble."

Respondent contends that the Complaint is procedurally defective in that "use of the phrase 'words to the effect' are not sufficient to provide adequate notice of the allegations nor is it sufficient . . . to simply show that similar words may have been spoken." Respondent also denies that Coy ever made the alleged statements and, even if made, were non-coercive and therefore did not constitute a violation of the Statute. As to the statements attributed to Bambrough, Respondent essentially takes the position that Byrne and Celli's versions should not be credited and Bambrough's version was merely an expression of personal opinion not proscribed by the Statute.

I find Respondent's argument that the Complaint is procedurally defective to be without merit. Section 2423.12 (b)(7) of the Authority's Rules and Regulations provides that a complaint shall include "(7) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." In my view the Complaint herein clearly meets this requirement and is sufficiently specific and detailed to apprise Respondent of the issues and prepare for the hearing. Cf. U.S. Government Printing Office, 13 FLRA 203 (1983). Moreover, Respondent has made no showing of being prejudiced by the variance between the charge and the Complaint. See, Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA 849 (1986). Indeed the statements alleged in the Complaint are very close to the statement which I find herein to have been uttered by Respondent's agent and there is no legal requirement that a complaint must set forth, in haec verba, the precise words ultimately found to have been used or fail on procedural grounds.[5]

With regard to the conversation between Section Chief Coy and employee Byrne on June 18, 1986, based upon my evaluation of the circumstances of the situation and the testimony of the witnesses I credit Byrne's version of the incident.[6] Thus, I find Byrne was told by Coy on June 18 words to the effect ". . . this grievance isn't going to do you any good." and "'if you do have any other problems in the future, don't go to the union, but come to me first.'"

In my view in the circumstances herein such statements did not violate the Statute. There is no evidence that during any discussion concerning Byrne's grievances that Coy demonstrated anger or animosity towards Byrne or the Union. Nor was the conversation accompanied by any explicit threat of reprisal or promise of benefit nor any suggestion of adverse consequences. Therefore I interpret the first part of the statement regarding the grievance not doing Byrne any good to have been simply a restatement of Coy's opinion that Byrne's failure to receive a promotion was not a grievable matter, which position he previously took with Byrne and Chief Steward Celli only shortly before and I find it would not be reasonable under the circumstances to attach an implication to Coy's statement that harm would come to Byrne for filing the grievance. Cf. Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA 766 (1982); Army and Air Force Exchange Service (AAFES), Ft. Carson, Colorado, 9 FLRA 620 (1982); and Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, 6 FLRA 159 (1981).

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[5] Since reconstruction of the exact words used in a conversation which has occurred many months passed is most often impossible, the statement "found" to have been used is, in reality, merely a definitive expression of the message conveyed.

[6] Byrne's testimony on this meeting was direct and concise. On the other hand, Coy testified in a conclusionary manner and appeared somewhat evasive as to testifying on precisely what was said during this meeting. However, both Byrne's and Coy's versions are very close to each other as to the general thrust of the conversation.

Similarly, with regard to Coy's statement regarding future problems, I find the most reasonable interpretation to be clearly a suggestion by Coy that before Byrne went to the Union with problems, in the future Coy would first like to have an opportunity to consider the matter.[7/] Indeed, to interpret the remarks as set forth in the Complaint that Byrne, in effect, was never to go to the Union with grievances would be to give no meaning to the word "first."[8/]

[7/] In his brief, counsel for Respondent urges that if Coy suggested to Byrne that he should go to him "first" such a request would have been consistent with provisions of the parties' collective bargaining agreement that every effort will be made by management and the aggrieved to settle grievances at the lowest possible level and the employee must first discuss the matter informally with his first level supervisor. Thereafter, counsel for the General Counsel moved to strike those portions of Respondent's brief which referred to provisions of the parties' contract since the agreement was not placed in evidence at the hearing and no witness offered testimony regarding such provisions. Counsel for the General Counsel's argument is well taken and accordingly, I do not rely on counsel for Respondent's assertions concerning the content of the collective bargaining agreement in reaching my decision herein.

[8/] I note that although the Complaint inexplicably left out the word "first" in the statement attributed to Coy, both Byrne's testimony and the affidavit he gave to the Authority during the investigation of the charge herein, supra, reflect Byrne's recollection that Coy used the word "first" in his remarks.

Accordingly, I conclude that is all the circumstances herein the preponderance of the evidence does not establish that Coy's remarks to Byrne violated the Statute. See Veterans Administration, Medical and Regional Office Center, White River Junction, Vermont, 6 FLRA 381 (1981) where a remarkably similar statement by a supervisor to an employee was found not to have constituted a violation of the Statute. Cf. Army and Air Force Exchange Service (AAFES), Rocky Mountain Area Exchange No. 4125, Fort Carson, Colorado, 8 FLRA 432 (1982). Compare Navy Resale System Field System, Field Support Office Commissary Store Group, 5 FLRA 311 (1981).

However, I conclude Supervisor Bambrough's remarks to Byrne on June 19 were violative of the Statute. Bambrough admittedly indicated that filing "nit-pick" grievances was "bucking management" and in his experience, "win, lose, or draw" it would not help Byrne with management subsequently. Thus, Bambrough clearly conveyed to Byrne that availing himself to the grievance machinery over matters Bambrough considered to be minor would likely result in adverse consequences to Byrne in his employment relationship with Respondent. Such "advice," even if given in a friendly manner by a superivsor, would reasonably convey to an employee that utilizing the parties' grievance procedure, conduct protected by the Statute, would cause the employee to fall into disfavor with management and indeed be harmful to that employee's employment career.[9]

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[9] The Answer to the Complaint herein admits that Bambrough (and Coy) were superivsors and/or management officials within the meaning of section 7103(a)(10) and/or (11) of the Statute and agents of Respondent. Counsel for Respondent takes the position that Bambrough's and Coy's statements to Byrne alleged to be violations herein were merely expressions of personal opinion and not binding upon management. I reject this contention, especially since Bambrough's remarks clearly conveyed to Byrne that, based upon Supervisor Bambrough's experience, Byrne was essentially risking future reprisal by management if he continued processing grievances. Bambrough, as a supervisor, was a management agent and indicated he was aware of management's disposition in such matters. Thus, I conclude in these circumstances that Bambrough's remarks cannot be construed as mere personal opinion outside the proscription of the Statute.

Accordingly, I conclude Superivsor Bambrough's remarks to Byrne on June 19, 1985 were coercive and intimidating in nature and reasonably tended to interfere with Byrne's statutory protected right to file what he thought were valid grievances, thereby violating section 7116(a)(1) of the Statute. Social Security Administration, Baltimore, Maryland, 18 FLRA 249 (1985) and United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA 724 (1980). I therefore recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah shall:

1. Cease and desist from:

(a) Interfering with, or discouraging, by implied threats or other means, any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute.

(a) Post at its facilities at Hill Air Force Base, Utah, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken comply herewith.

IT IS FURTHER ORDERED that the allegation that Respondent otherwise unlawfully interfered with, restrained or coerced employee Gregory Byrne be, and hereby is, dismissed.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: August 11, 1986
Washington, D.C.

[7-CA-50580]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, or discourage, by implied threats or other means, any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: __________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202and whose telephone number is: (303) 837-5224.

9-3 No. 64

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 64

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

November 13, 1986

UNFAIR LABOR PRACTICE CASES

Case No. 7-CA-50551 (October 13, 1986)

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, AFL-CIO, Local 1592

Case No. 3-CA-50355 (October 29, 1986)

Federal Railroad Administration and American Federation of Government Employees, Local 2814, AFL-CIO

Case No. 8-CA-60087 (October 31, 1986)

U.S. Naval Supply Center, San Diego, California and American Federation of Government Employees, AFL-CIO, Local 1399

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DEPOSITORY 376

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3.F 31/21-3:

Case No. 7-CA-60121 (October 31, 1986)

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, AFL-CIO, Local 1592

Case No. 6-CA-60029 (November 13, 1986)

United States Department of Defense, Department of the Army, United States Army Air Defense Center and Fort Bliss, Fort Bliss, Texas and National Association of Government Employees, Local R14-89

[7-CA-50551]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 7-CA-50551

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1592

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 10, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., October 23, 1986

Harold D. Kessler
Harold D. Kessler
Director of Case Management

READEX FICHE best copy available

[7-CA-50551]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE,
OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1592

Charging Party

Case No.: 7-CA-50551

Clare A. Jones, Esq.
For the Respondent

Matthew Jarvinen, Esq. and
Joseph Swerdzewski, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 *et seq.*

Upon an unfair labor practice charge filed by the American Federation of Government Employees, AFL-CIO, Local 1592 (herein referred to as the Union) against the above captioned Respondent, the General Counsel of the Authority, by the Regional Director for Region VII, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) of the Statute when on two occasions Respondent's foreman Steve Romero made statements to an employee-Union representative regarding her filing grievances.

A hearing on the Complaint was conducted in Ogden, Utah at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by counsel for Respondent and counsel for the General Counsel and have been carefully considered.

Upon the entire record in this case,[1] my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein referred to as AFGE) has been the exclusive collective bargaining representative of a nationwide unit of employees employed by Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio including various employees located at Hill Air Force Base, Utah (herein referred to as Hill AFB). AFGE's Council 214 is an affiliate and agent of AFGE and Local 1592 is an affiliate and agent of Council 214. Employees at Hill AFB are represented by AFGE through Local 1592.

Steve Romero became a Foreman for Respondent in its material receiving section at Hill AFB around the second week of February 1985, apparently having been employed by Respondent for a number of years previously. Valeen Trujillo was an inspector under Romero's immediate supervision and had been employed in the material receiving section since March 1984 when she also became a Shop Steward.[2] According to

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[1] Counsel for the General Counsel's unopposed motion to correct the transcript is hereby granted.

[2] Trujillo was a Shop Steward from March 1984 to May 1985 when she resigned her union office on being reassigned jobs. She described her steward duties as having ". . . worked more or less between the employees and the union" and having given ". . . information which resulted in . . . Unfair Labor Practices." During her employment she had filed only one grievance and that was against her previous supervisor approximately three years prior to the hearing. She testified she would not describe herself as a "fairly active steward." However, prior to the incidents described

(footnote continued)

Trujillo whose testimony varies substantially from Romero's regarding the following incidents, on April 23, 1985 Romero held a meeting of 15 to 20 of his employees at which he related information he received at a staff meeting and discussed safety matters. During the meeting Trujillo asked why another employee had been coming in late mornings rather than working the normal hours. Romero responded stating the employee had been changed to a special swing shift. Later that same day Romero called Trujillo into his office and ". . . bluntly stated, 'What's your problem?'"3/ Trujillo explained that she felt employees were not being given information they needed so they could cover other work areas when an employee was missing. She stated she thought it was unfair that she and another inspector were required to sweep floors, clean shelves and do other tasks and lower grade employees were assigned their work.4/ Trujillo testified Romero responded in an intimidating "tone",5/ and, according to Trujillo:

> "He told me that I was a trouble maker and that the employees did not like me, management didn't like me and that all

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(footnote 2 continued)

herein, Trujillo had voiced complaints with Romero about various undisclosed matters at work and according to Trujillo, he did nothing about them. It does not appear from the record that Trujillo was pursuing her complaints described herein in her capacity of Shop Steward but rather was expressing her concerns as an individual employee.

3/ When asked to describe Romero's style of supervision Trujillo responded: "He likes to totally dominate his employees. You have no input and do not question anything. Do as he says."

4/ In cross-examination Trujillo testified that she also complained of having to do the work of others while they were "romancing" on the job.

5/ Trujillo explained that Romero did not shout but it was "more in his actions" of pacing the floor and leaning over her during the one and one-half hour meeting that she found intimidating.

> Bob Vega and I did was file grievances against him."6/

Trujillo also testified Romero told her that if she filed a grievance, he would countersue her. Trujillo added on redirect examination that when Romero made this statement she replied she never filed any grievances against him, but he ignored the comment.

Romero testified that on or about April 23, 1985 he noticed that Trujillo seemed "troubled" and asked her to come into his office where he asked her what her problem was. When asked to describe what occurred at the meeting Romero testified:

> "She said, 'Well, I don't want to talk about it.' She said, 'It doesn't do any good to talk to you. You listen to whoever you want to listen to. It doesn't do me any good to talk to you.' So I then told her, 'I'm your supervisor. I'm here to listen to you. That's my job. I get paid to listen to your problems and to discuss them with you.' And she says, 'No, it doesn't do me any good to talk anything over with you.' She says, 'You have your favorite people here. It doesn't do me any good.'"

Although first testifying that nothing else was said at the meeting, upon being led by counsel for Respondent regarding mention of an office romance, Romero recalled Trujillo complaining at the meeting that he let an employee "get away with everything" and Trujillo was aware of ". . . an affair going on and all this stuff. . . ." Later still, Romero recalled Trujillo accusing him of letting people off on government time without making them punch out. Romero subsequently also recalled that Trujillo related a problem she had with another ". . . girl (who) had thrown a box at her . . . something like that . . . and nobody likes her, that every time we had dinners or little parties, she's not included, and things like this." With regard to the matter of the "affair," Romero testified:

6/ Bob Vega is another Shop Steward that works for Romero. The record provides no further details about Vega nor does it reveal whether Vega ever filed a grievance against Romero or anyone else.

> "She said that I overlooked a lot of things. 'There was an affair going on and you overlooked it. You don't say anything about it.' You don't do this, you don't do that. I told her that I was a new supervisor there, that if it was going on I was going to make observations, and I was going to look into it, but there was no indication at the time for me to investigate an affair between another man or woman going on."

Romero denied calling Trujillo a troublemaker or saying all she and Vega did was file grievances against him or threatening to countersue her.7/

On the following day, April 24, Trujillo telephoned Romero and, according to Trujillo, asked to be put on annual leave. Romero informed Trujillo she would be put on AWOL unless she gave him a reason for her absence. Trujillo responded that she had been ill the previous night and was upset about her conversation with Romero on the previous day and needed some time to pull herself together. Romero said he had no choice but to put her on AWOL and hung up.

According to Romero, on April 24 Trujillo called him and said she was not reporting to work that day. When Romero inquired as to the reason, Trujillo said: "'Well, yesterday you called me a troublemaker and you said this and that, and nobody likes me, and you don't listen to me,' or more or less what happened the day before." When asked to give a complete account of the telephone call Romero testified:

> "She told me that she was not reporting to work. She says, 'I'm not coming in today,' and I said, 'What's the matter? Why don't you want to come to work?' And she said, 'Well, because you don't like me. Nobody there likes me.' She said, 'Everybody thinks I'm a troublemaker. I'm just not coming to work.' And I said, 'Are you requesting annual leave or sick leave?' And she said, 'You put me on whatever.' And I said, 'What

---

7/ According to Romero, the entire meeting took about 10 minutes.

> do you mean by that?' She said, 'You put me on whatever you want. I'm just not coming in.' And I told her, 'On the basis of what you're telling me, I can't really grant you leave because of that excuse. I need you at work. I would like you to come to work. I need you to come to work right now." And she said, 'Well, I'm not coming in and that's all there is to it.' And then she hung up."

Romero put Trujillo on AWOL for April 24 and on April 25 Trujillo told Romero she was considering filing a grievance on the matter and asked permission to meet with Union Steward Roger Pulido. Romero suggested that Trujillo and he meet and discuss the matter before she met with Pulido but Trujillo indicated such a meeting would not be helpful. Romero then made arrangements for Trujillo to meet with Pulido on May 1 or 2.

On or about April 30 Romero met with Trujillo and told her he was considering changing her April 24 AWOL to annual leave. Trujillo told Romero she really didn't care what Romero did about the matter and again accused him of playing favorites with employees. Romero informed Trujillo he would change her AWOL to annual leave and hoped this would resolve their differences and make for a better relationship in the future. Trujillo indicated she was still upset about having been put on AWOL and would never let Romero "live this down." Romero asked if she preferred moving to a different work area and Trujillo declined. Shortly after the meeting Romero asked Trujillo if she still wanted to keep her appointment with Union Steward Pulido since she was no longer on AWOL and Trujillo respondent "yes", stating she was still considering filing a grievance and needed some advice. On that same day or the following day Romero presented Trujillo with a memorandum dated April 30 recounting the conversation he had with her during the meeting. Trujillo challenged, in writing, numerous statements in the document entitled "Consultation on AWOL action." The memorandum states, inter alia:

> "I told Valeen Trujillo that I was considering changing her AWOL to A/L (annual leave) because I couldn't honestly say that the workload was such to say that I needed her at work that day, but that I didn't feel that her reasons, because no one likes her or because she thinks I don't like her

> were enough reasons to validate her annual leave. She told me, that she had told me she wanted that day off to get herself together. I told her I didn't recall her putting it that way." (Underscored portion was challenged by Trujillo by commenting, "This was not the reason").

Romero told her he was putting the memorandum in her "971 file" so their would be a record of the matter.[8]

Trujillo met with Pulido around May 1 or 2. Pulido suggested she file an EEO complaint rather than a grievance concerning her dispute with Romero and Trujillo never filed a grievance on the matter. However, Romero was under the impression that a grievance on his putting Trujillo on AWOL had been filed with Pulido.

Romero testified that sometime during the first week of May 1985 he had a conversation with Trujillo at which time he explained he was a new supervisor and wished to settle their differences and start over again since he changed the AWOL to annual leave and asked why she was still pursuing her grievance.[9] However, Trujillo insisted she wished to pursue her grievance with the Union and accused him of letting people off work on government time and turning his back on affairs that were occurring. According to Romero, Trujillo said she knew about his "character" and accused him of going around with married women, drinking, taking drugs and smoking pot. Romero testified that Trujillo also accused him and his boss of allowing their friends to take items from the "security cage" after work hours.[10]

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[8] The "971 file" is not part of an employees Official Personnel File but is retained by the supervisor.

[9] Romero testified he had numerous discussions with Trujillo during this period but was vague about both the precise date and specific content of each discussion.

[10] The record does not specifically reveal what Romero's reaction was to these alleged accusations other than Romero's statement on cross-examination that he never became upset about Trujillo's complaints about matters at work.

Romero testified to another conversation with Trujillo sometime shortly before May 20. As to this conversation, Romero testified:

> "A . . . I told her that being that we couldn't settle our (differences), I told her when I would have to do an appraisal on her, I says, 'If I don't give you a good appraisal, are you going to come back on me and say it's trouble between us, and that I'm not being fair with you?' And I says, 'I don't think that if I was to give you an appraisal, that you would probably refer to this incident, and that's why you would contest this appraisal (sic).' And I said, 'That's why I don't feel that I could be objective about the appraisal.'
>
> . . . . .
>
> "JUDGE ARRIGO: . . . what else was said: What did she say?
>
> "A I don't recall anything else being said as far as -- the only thing is that just what she said over and over every time she confronted me. She complained to me about the same thing.
>
> "JUDGE ARRIGO: Such as?
>
> "A Such as that I was unfair. That I would only listen to certain people.
>
> "JUDGE ARRIGO: What did you say?
>
> "Every time she would confront me I would ask, 'Valeen, why are you pursuing on this issue? I've changed it from the AWOL to annual leave, and I thought that would appease you,' and she said, 'No, I want to see the union. I want to go talk to these union representatives.' . . .
>
> . . . . .
>
> "JUDGE ARRIGO: Well, sometime before the 20th when you had this

> (conversation) about appraising her, did you tell her that she was going to be transferred at that time?
>
> "A I told her I was -- I never said that I was going to transfer her, no. I told her at the time when we were having this meeting that I wished that we could settle our differences. I said, 'I still have to be your supervisor. I still have to appraise you, and when your appraisal comes in, are you going to come back on me and say I didn't give you a good appraisal because of the (differences) we had between us at that time?'"

Trujillo testified that on May 20 Romero initiated a conversation with her in the office of Jerry Derrick, Romero's supervisor, at which time he informed her that eight people came and told him to get her out of the work area because she was writing notes against them. According to Trujillo, she told Romero there was no work that morning so she wrote a letter to her daughter and several notes which the employees could read. Trujillo asked Romero to bring the employees in so they could discuss the problem and perhaps "iron out" the difficulty but Romero declined "because of the Privacy Act". According to Trujillo, during this meeting which lasted approximately one hour, Romero indicated he could take the April 30 memorandum, supra, out of her 971 File and she would then have no reason to follow through with her grievance. Trujillo replied that there were other problems she wanted to get "squared away." Romero also told Trujillo that Wayne Everly, from Respondent's Labor-Relations office, told him that if Trujillo insisted on proceeding with the AWOL grievance, she could be "fired or terminated" for making false statements.[11] Trujillo also testified that Romero said Everly told him he could transfer Trujillo anywhere he wanted with no prior notification as to where or when and ". . . he could get rid of me if I didn't change my attitude; if I continued with the grievances because -- or he would have to disqualify himself as my supervisor."

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[11] On cross-examination Trujillo added that Romero said Everly showed him a letter that supposedly came from the Union stating an employee could be fired or terminated for filing a grievance containing false statements. Romero asked Trujillo if she had seen the letter and Trujillo replied she had not.

On cross-examination Trujillo testified:

> "Q And that -- was it also Mr. Everly that told Mr. Romero that if you didn't change your attitude, that either he would have to -- you would either have to be transferred or he would have to disqualify himself as your supervisor?
>
> "A Yes, he said -- he worded it he would have to get rid of me or disqualify himself as my supervisor.
>
> "Q What did you think he meant by disqualify himself as your supervisor?
>
> "A I didn't know.
>
> "Q From an appraisal standpoint, or from a rating standpoint?
>
> "A Well, he had already told me that if I didn't change my attitude and not go ahead with the grievance, that my appraisal would reflect it.
>
> "Q And because of that personality conflict, he would maybe have to disqualify himself of appraising you?
>
> "A No, that wasn't the case.
>
> "Q What did you think he meant by disqualify?
>
> "A I didn't even think about it.
>
> "Q But that's something also that Mr. Everly had told Mr. Romero; is that correct?
>
> "A That's my understanding, yes."[12]

---

[12] Trujillo had not testified on direct examination with regard to Romero making any mention of her appraisal.

Trujillo further testified that during this conversation Romero told her she was not to speak to two particular employees. Trujillo objected and said something about the "checkered past" of management now becoming "pure of heart." Trujillo described Romero's reaction as "absolutely violent . . . screaming, yelling . . . walking and waving his arms." Romero told Trujillo he never in his entire life had an affair and if she ever mentioned it he would sue her. Trujillo testified her reply was to deny accusing anyone of having an affair and only mentioned the "checkered past".13/

Trujillo testified she was thereafter transferred out of Romero's section on May 23 or 24, 1985.

Romero testified that on May 20, 1985, he had been told by his supervisor that Trujillo would be working for Mr. Thatcher, another supervisor in Trujillo's work area. According to Romero, he then called Trujillo and Thatcher into his office and announced Trujillo's immediate transfer whereupon Thatcher welcomed her to his crew.14/ Romero denied making the statements Trujillo attributed to him regarding any conversation with Wayne Everly or making statements tantamount to threats of reprisal related to her pursuit of a grievance.

Credibility Resolutions, Discussion and Conclusions

The Complaint alleges on or about April 23, 1985 Romero told Trujillo ". . . words to the effect that: (a) she was a troublemaker and that all she and another Union Steward did was to file grievances against Romero; and, (b) he (Romero) would countersue (Trujillo) if she followed through with her grievances." The Complaint also alleges that on or about May 20, 1985 Romero told Trujillo ". . . words to the effect: (a) that she could be terminated or fired if she persisted with a grievance over an AWOL charge because to

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13/ On cross-examination Trujillo acknowledged that what she meant by "checkered past" was to the tendency of supervisors" . . . to engage in office romances in spite of their being married." Trujillo denied ever accusing Romero of being involved with drugs or theft.

14/ Neither Thatcher nor Romero's supervisor was called to testify. Nor were any documents relating to Trujillo's transfer produced during the hearing.

file a grievance over the AWOL would be lying or making a false statement; and, (b) that if she did not change her attitude about grievances, he would have to disqualify himself and they would have to get rid of him or her."

Respondent denies that the statements alleged to be violative of the Statute were ever made by Romero. Respondent also takes the position that with regard to the alleged April 23 remarks, any statement made by Romero relative to Trujillo being a troublemaker and filing grievances was merely a privileged expression of personal opinion not binding on Respondent and any statement made by Romero regarding countersuing Trujillo was directed at false statements by Trujillo in connection with her filing a grievance or making "slanderous and malicious" statements about his conduct. Similarly, Respondent contends that the alleged May 20 statements were directed at false statements by Trujillo related to the grievance and the remark Romero was alleged to have made regarding Romero disqualifying himself only went to his ability to appraise Trujillo in view of the conflicts which existed between Trujillo and Romero.

Obviously this case turns on the credibility of Trujillo and Romero. Unfortunately I have substantial doubts as to the veracity of both witnesses. In addition to the demeanor of both which I found unimpressive, the testimony of both leaves me with substantial doubts as to the accuracy of their recollections. Both gave confusing and rambling accounts of their meetings and at times each appeared to have selective memories, relating versions of incidents which only place her or him in the most favorable light and modifying the original version as testimony proceeded. Trujillo obviously harbored ill will against Romero because of what she termed his desire to "totally dominate his employees", allowing no input or questioning from employees. Trujillo seemed inclined to juxtapose words, indeed in a forced fashion, so that virtually all of Romero's comments to her would appear to be threats related to her having indicated to him that she was pursuing a grievance involving him. It is also apparent that Romero must have been somewhat irked by Trujillo's repeated complaints about other employees and allegations of favoritism and accusations of improper conduct on Romero's part. Romero, perhaps because he had only recently become a supervisor, was obviously concerned by his mistaken belief that Trujillo was pursuing a grievance involving his having previously put Trujillo on AWOL. Moreover, it is not likely that Romero if accused by

Trujillo of marital infidelity and other improper conduct as he claimed would not have become "upset" as he claimed.

Turning now to the specific allegations herein, I do not credit Trujillo's version of the April 23, 1985 conversation that Romero told Trujillo that all she and Vega did was file grievances against him and he would countersue her if she filed a grievance. At that time Trujillo had never filed a grievance against Romero and indeed had only filed one grievance against anyone during the prior three year period. The record does not indicate that Trujillo threatened to fil a grievance against Romero during that meeting nor does it disclose she previously threatened to do so. Nor is there any evidence that Vega had ever filed a grievance against Romero or anyone else for that matter. In these circumstances and in view of my doubts as to Trujillo's general credibility I find the allegations relating to the April 23 conversation to be unsupported by the credited record evidence.

With regard to the allegation concerning the conversation which occurred on or about May 20, 1985, clearly Trujillo and Romero did have a meeting around this time, although the precise date of the meeting and nature of the conversation are disputed.[15] I essentially find that what actually transpired was as a composite or synthesis of the credited portions of Trujillo's and Romero's versions of this meeting.[16] Thus I find that Romero asked Trujillo if she was still pursuing the grievance since he had changed her AWOL to annual leave and could remove the memorandum from the 971 file. When Trujillo answered that she was continuing with her grievance, Romero indicated that as her supervisor he would eventually have to appraise her work and if he failed to give her a good appraisal, she would probably challenge his objectivity in the appraisal by pointing to the grievance she had against him. Romero then added that with the grievance still pending, he would either have to transfer Trujillo from his staff or disqualify himself from appraising her in order to avoid this problem. In my view Romero was simply relating the quandry he was in and such statements as found above would not constitute a violation of the Statute.

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[15] As to the date of meeting, Trujillo places it at May 20 and testified that she was thereafter transferred to another crew on May 23 or 24. Romero placed the meeting a short time before May 20, testifying that on May 20 he met with Trujillo and supervisor Thatcher to effectuate Trujillo's immediate transfer to Thatcher's crew. While the exact date of a meeting is most often not particularly significant in evaluating evidence, in the case herein the Complaint specifically alleged the meeting occurred on May 20 and Respondent's only witness testified that a meeting occurred on that date which was devoid of contention and witnessed by a third party. However, even though Trujillo's testimony clearly conflicted with Romero's on this matter, Respondent did not call Thatcher to testify nor explain its failure to call nor did Respondent offer any documentary or other evidence relative to the exact date on which Trujillo was transferred. I have considered this in making my credibility findings herein.

With regard to this same meeting I further find that, in order to induce Trujillo to withdraw the grievance he thought she was still pursuing relative to her being placed on AWOL, Romero told Trujillo in essence that, based on information he received from Wayne Everly of Respondent's Labor Relations staff,[17] an employee could be discharged if the employee filed a grievance and made false statements in that grievance. The only dispute according to both Trujillo's and Romero's versions of the matters of Trujillo being put on AWOL was Trujillo's contention reflected in Romero's memorandum dated April 30 that she told Romero she would not report to work on April 25 because she needed time to pull herself together versus Romero's recollection that Trujillo wanted the day off basically because she felt she was thought of as a troublemaker, no one liked her and Romero didn't listen to her. Even crediting Romero's version of the telephone call, this would hardly constitute a falsification in connection with a grievance on Trujillo's part which would justify discharge. Indeed any reasonable employee would hardly file any grievance if an element of the grievance involved a dispute as to what was said in a given conversation and the employee's failure to have his version credited could result in discipline for having made a false statement. The threat of such discipline in this circumstance would thwart and restrain an employee's free and untrammeled access to utilizing the grievance machinery to vindicate perceived wrongs. Accordingly I conclude such conduct is violative of section 7116(a)(1) of the Statute. Cf. Social Security Administration, Baltimore, Maryland, 18 FLRA 249 (1985); Federal Election Commission, 6 FLRA 327 (1981); and United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA 724 (1980).

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[16] As stated by Chief Judge Learned Hand in N.L.R.B. v. Universal Camera Corp., 172 F. 2d. 749 (2d Cir. 1950) at 754: "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

[17] I note Everly was not called by Respondent to deny having given such information to Romero.

Clearly a portion of this conversation also dealt with Trujillo's reference to Romero's alleged "checkered past" as she recalled the conversation or allegations of improprieties on Romero's part according to Romero's recollection. I credit Trujillo's account of Romero's explosive reaction to such allegations, the particular nature of which need not be resolved herein,[18] to be what one might expect under the circumstances, including Romero's threat to sue or countersue. However, the credited testimony does not establish that Romero threatened to sue or countersue Trujillo for following through with her grievance. Rather, Trujillo testified, and I so find, Romero's statement in this regard was made strictly in response to the allegations of personal impropriety Trujillo made against Romero. Indeed I find this portion of the conversation occurred separate and apart from the discussion of Trujillo's grievance which both parties viewed as dealing only with the AWOL matter. Thus, based upon the credibility resolutions made herein, Romero's threat to sue was only directed to Trujillo's comments regarding Romero's alleged personal conduct and not directed to the subject of Trujillo's pursuit of a grievance which involved the AWOL and the telephone conversation of April 23. In these circumstances I do not conclude Romero's threat to sue constituted a violation of the Statute. Cf. Department of Treasury, Internal Revenue Service, Louisville District, 20 FLRA 660 (1985).

Accordingly, in all the circumstances herein I recommend the Authority issue the following:

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[18] I credit Romero's testimony that Trujillo made specific allegations of misconduct on his part.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah shall:

1. Cease and desist from:

(a) Interfering with, or discouraging, by implied threats or other means, any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute.

(a) Post at its facilities at Hill Air Force Base, Utah, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the

Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken comply herewith.

IT IS FURTHER ORDERED that the allegation that Respondent otherwise unlawfully interfered with, restrained or coerced employee Valeen Trujillo be, and hereby is, dismissed.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: September 10, 1986
Washington, D.C.

[7-CA-70551]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, or discourage, by implied threats or other means, any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: __________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202 and whose telephone number is: (303) 837-5224.

[3-CA-50355]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL RAILROAD ADMINISTRATION

Respondent

and

Case No. 3-CA-50355

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2814, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 15, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., October 29, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[3-CA-50355]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

FEDERAL RAILROAD ADMINISTRATION

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2814, AFL-CIO

Charging Party

. . . .

Case No.: 3-CA-50355

Peter A. Sutton, Esquire
Phillip Boyer, Esquire
For the General Counsel

Joseph R. Pomponio, Esquire
For the Respondent

Mr. F. William Perdichizzi
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et. seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on June 3, 1985, by Local 2814, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or Charging Party), a Complaint and Notice of Hearing was issued on April 22, 1986, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C.[1] The Complaint alleges in substance that the Federal Railroad Administration, (hereinafter called the Respondent or FRA), violated Section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute) by refusing to comply with an arbitrator's award.

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[1] The Complaint was amended on June 13, 1986.

A hearing was held in the captioned matter on June 17, 1986, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post hearing briefs on July 17, 1986, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union, which represents a nationwide unit of Respondent's professional and non-professional General Schedule and Wage Board employees, and the Respondent are parties to a collective bargaining agreement which provides in pertinent part as follows:

> ### ARTICLE XII
>
> ### VOLUNTARY REASSIGNMENT
>
> Section A. Vacancies at GS-5 and above (excluding trainee positions) may be filled in various ways including, but not limited to: voluntary reassignment, from one geographical location to another, an employee request for downgrading, reduction-in-force, or from qualified candidates on a Civil Service Register.
>
> The Associate Administrator for Administration, or his designee, must determine what method of filling positions is in the best interest of FRA.
>
> The Employer recognizes that employee morale is a significant factor in making that determination and agrees to give special consideration to those unit employees who have applied in the

> prescribed manner in Section B., below, their desire for voluntary reassignment to a different geographical location.
>
> . . . . .
>
> Section D. Travel and Transportation expenses may be allowed any employee when it is in the interest of the Government to fill a position by movement of a current employee from one duty station to another at a different geographical location. A permanent change of station will not be authorized at Government expense when it is primarily for the benefit of the employee or at his request. In accordance with these provisions the Employer agrees to reimburse employees' moving expenses when: (1) the employee is selected for a position which constitutes a promotion, (2) an employee is filling a position where the incumbent immediately previous to that employee left as a result of being promoted by FRA, (3) the employee is filling a position which was moved from one location to another, (4) the employee is filling a new position, or (5) in the case of a directed reassignment.

On May 25, 1982, Respondent announced an opening for a GS-12 Railroad Safety Inspector (Hazardous Materials) in Fort Worth, Texas. The vacancy announcement stated, among other things, that unit employee "requests for reassignment or change to lower grade will be accepted for this position". In accordance with the responses to the announcement, Respondent prepared a best qualified list for the vacancy which consisted of five candidates, three in-house applicants and two outside applicants. The in-house candidate with the most seniority was unit employee Mr. Bill Steel who was at that time employed as a GS-12 Hazardous Safety Inspector in Kansas City, Missouri. Thus, Mr. Steel's application for the vacancy opening in Fort Worth amounted to a request for reassignment or lateral transfer.

Subsequently, following the Respondent's action in filling the Fort Worth position with an outside candidate named Mr. Leon Sapp, the Union filed a grievance on Mr. Steel's behalf. The grievance eventually was submitted, on the basis of stipulated facts and legal briefs, to Arbitrator Seymour Strongin for a final decision. The stated issue was:

> whether the Agency violated Article XII of the Agreement between the parties when it appointed Leon Sapp, an "external" candidate (i.e., an applicant from outside the Agency), to a position as Railroad Safety Inspector (Hazardous Materials) in Fort Worth, Texas, although several "internal" candidates had also applied for the position and, like the successful applicant, had been given a "best qualified" rating.

Respondent submitted three arguments to Arbitrator Strongin in defense of its decision to select Mr. Sapp, the outside candidate. Thus, Respondent argued that if it transferred Mr. Steel to the Fort Worth vacancy then it would be forced to post a vacancy in Kansas City and such process could go on indefinitely and frustrate Respondent's efforts to augment its current staff. A second reason for not selecting Mr. Steel for Fort Worth was the savings to be achieved by not paying moving expenses.[2] The third reason for not transferring Mr. Steel was the opportunity to add a new highly qualified employee to its staff.

On December 9, 1982 Arbitrator Strongin issued his decision wherein he concluded that Respondent had violated the parties collective bargaining agreement when it failed to accord Mr. Steel "special consideration", as required by Article XII of the agreement, for the Fort Worth opening.

While acknowledging in his decision that the collective bargaining agreement failed to precisely define the term "special consideration", Arbitrator Strongin found such term to be more than an empty expression which could be ignored at the whim of the Agency. Finding the Respondent's defenses to be without merit, Arbitrator Strongin went on to state as follows:

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[2] It appears that Mr. Sapp was already located in the Fort Worth area.

> The Arbitrator is not holding that the Agency can never make a case for denying the transfer application of an internal applicant. Each case must turn on its own facts. In this case the Agency has not only admitted that it indulged a presumption against inside applicants, but its reasons for selecting the outside applicant are far from compelling. Its arguments that at least one additional posting would be required or that moving expenses would be paid would not distinguish this case from others arising under the same Agreement, which at the same time it creates those conditions nevertheless requires "special consideration" for internal applicants in the interest of employee morale. Its suggestion that the external applicant is a valuable addition to its staff would carry weight only if it showed that this applicant could be assigned only to this particular office. In filling vacancies in which an internal applicant is listed among the best qualified, the Agency, if it selects an external applicant, must show that it gave the internal applicant "special consideration" as required by the Agreement, and must establish that the selection of the external applicant was dictated by "the best interest of FRA".
>
> . . . . .
>
> The Agency says that it did [give special consideration to the inside applicant], but nothing in the submitted facts supports this assertion. The Agency says it had to hire outside applicants, but the issue here goes not to the hiring of the outsider but only to assigning him to a particular locale. The Agency repeats its "musical chairs" argument, but this overlooks the fact that an inside applicant transferring to Steel's vacancy would not be entitled to moving expenses, and the probability of such transfers at employee expense is very low. The Agency argues that it augments its expertise by

> hiring Sapp, the outside applicant, but again the question is not whether Sapp should be hired, but only whether he should be assigned to Fort Worth.
>
> . . . . .
>
> All that is required is that, in the interest of employee morale, it gives special consideration to in-house applicants. If, for example, Steel in this case had been shown to be not well-suited for appointment to Fort Worth, or if, for another example Sapp had been shown to be available only at Fort Worth, the Agency would unquestionably have been free to appoint Sapp. As the record now stands, however, the Agency after it received the "best qualified" ratings of Sapp and Steel gave the latter no "special consideration" whatsoever, and on the contrary used the "in-house" nature of his application as a "special consideration" for denying it.

In accordance with the above analysis, Arbitrator Strongin concluded that "special consideration" had not been given to Mr. Steel's application for the Fort Worth vacancy, and therefore sustained the Union's grievance. As a remedy the Respondent was ordered by Arbitrator Strongin to transfer Mr. Steel to the Fort Worth office and to pay him appropriate expenses. Thereupon, Respondent filed exceptions to Arbitrator Strongin's award with the Federal Labor Relations Authority.

On July 31, 1984 the Federal Labor Relations Authority issued its decision in U.S. Department of Transportation, Federal Railroad Administration, 15 FLRA 401, which reads in pertinent part as follows:

> It is well-established that an arbitrator's award may not interpret or enforce a provision of a collective bargaining agreement so as to deny the authority of an agency to exercise its statutory rights under 7106(a) of the Statute, or so as to result in the substitution of the arbitrator's judgment for that of the agency in the exercise of

those rights. Veterans Administration Hospital, Lebanon, Pennsylvania and American Federation of Government Employees, AFL-CIO, Local 1966, 11 FLRA No. 43 (1983). Section 7106(a)(2)(A) of the Statute reserves to management officials the right to assign employees. Section 7106(a)(2)(C) reserves to management the right in filling positions to make selections from among properly ranked and certified candidates or from any other appropriate source.

Thus, in terms of this case, while the Arbitrator had considerable latitude in fashioning a remedy for the Agency's violation of the parties' agreement, his award is deficient in two respects. First, to the extent the award directs the Agency to reassign the grievant to Fort Worth the award is contrary to section 7106(a)(2)(A) and second, to the extent the award directs the Agency to vacate its selection and select the grievant for the Fort Worth position the award is contrary to section 7106(a)(2)(C).

Therefore, the Arbitrator's award is modified to provide the following remedy in place of that ordered by the Arbitrator:

> The Agency shall rerun the selection action for the Railroad Safety Inspector (Hazardous Materials) GS-12 position in Fort Worth, Texas. The rerunning of the selection action by the Agency and any action involving the incumbent employee must fully conform with controlling law and regulation and the parties' collective bargaining agreement. More particularly, the rerunning of the selection action and any action involving the incumbent employee must be in accordance with section 7106(a) of the Federal Service

> Labor-Management Relations Statute and the corrective action provisions of Federal Personnel Manual chapter 335, appendix A, section A-4b.

Thereafter, in the period January-April 1985, Respondent reran the selection action as ordered by the Authority and again selected the outside candidate, Mr. Sapp, over Mr. Steel, the inside applicant. In selecting Mr. Sapp rather than Mr. Steel, the Respondent utilized the following procedure:

> After the closing date of an advertisement for a Railroad Safety Inspector vacancy, the selection list consisting of the names of the internal candidates who are requesting a voluntary reassignment is forwarded to the Office of Safety. This list is marked "special consideration". If, upon review the Office of Safety determines that none of the internal applicants should be reassigned to the vacant position, it substantiates its rationale in writing to the Office of Personnel. After the justification is received and the Office of Personnel verifies that justification is in accordance with law, rules, regulations and the Collective Bargaining Agreement, a list of external candidates from the National Railroad Safety Inspector Register is then forwarded to the selecting official in the Office of Safety for consideration.

Prior to the use of this new procedure the record indicates that inside and outside applicants were included on one combined list.

On January 25, 1985, a list of the best qualified in-house candidates was forwarded to the selecting official, Associate Administrator for Safety, Mr. Joseph Walsh. The best qualified list of in-house candidates was headed by Mr. Steel and stamped "Special Consideration".

On April 11, 1985, Mr. Walsh, who had also been the selecting official back in 1982, again decided not to select Mr. Steel for the Fort Worth vacancy. In support of his decision, Mr. Walsh stated in a memorandum dated April 11, 1985 as follows:

> The Office of Safety has reviewed the application(s) provided by the Office of Personnel for the above-referenced vacancy. We have given special consideration to internal candidates requesting voluntary reassignment. However, 5 U.S.C. 7106(a)(2)(C) authorizes management to fill a vacancy from any appropriate source. As a result of an overriding agency need to maintain the Safety Inspector work force at a staffing level sufficient to meet mission requirements, I have decided to exercise my management authority to consider external candidates for possible selection for this vacancy. I am, therefore, requesting that you provide my Office with certificates of eligible external candidates who applied through merit promotion procedures and through the OPM register.

A list of external candidates was forwarded to Mr. Walsh on April 11, 1985. Several days later on April 18, 1985, Mr. Walsh again selected Mr. Sapp for the Fort Worth position, citing the reason for his selection as the "Best Qualified". Subsequently, on May 20, 1985, Ms. Brenda Hooks, Respondent's Chief of Labor/Employee Relations, notified the Union by a written memorandum that Mr. Steel had again not been selected for the Fort Worth vacancy. The reason cited for Mr. Steel's non-selection was "overriding Agency need to maintain the Safety Inspector work force at a staffing level sufficient to meet mission requirements". No further information concerning the selection of Mr. Sapp over Mr. Steel for the Fort Worth position was ever furnished to the Union.

On April 10, 1986, approximately one year after the charge in the instant proceeding was filed, Mr. Walsh, in a sworn affidavit stated in pertinent part as follows:

> 4. That April 11, 1985 memorandum states that all internal applicants were not selected because of an overriding FRA need to maintain the safety inspector workforce at a level sufficient to meet mission requirements. However, that

> general reason was given without specifics because I believed that the existence of a document containing negative comments about Mr. Steel's potential might be harmful to his career. On at least one previous occasion, I had in fact listed the specific reasons why I was not selecting an internal candidate. Unfortunately, that candidate, having heard of my statement, became very disturbed. In order to avoid any future disruptions and in the interest of the FRA's morale, I decided to provide general statements in all such similar cases in the future without specific criticism of the individual.
>
> 5. While my reason for not selecting Mr. Steel was not iterated in the memorandum of April 11, 1985, I will note here that I did not select Mr. Steel for the position because the Fort Worth area has a high volume of hazardous material movement and I believed that Mr. Steel's background and experience did not support his ability to handle the large volume without a significant loss of efficiency in Fort Worth, which would have a severe negative impact on operations there.

During the course of the hearing, Mr. Walsh reiterated that an additional reason for Mr. Steel's non-selection was his limited experience in the area of processing hazardous materials. Mr. Walsh testified that he was of the opinion that Mr. Steel could not handle the "high volume" of hazardous materials processed by the Fort Worth position. On cross-examination Mr. Walsh did acknowledge that staffing did play a part in his decision to hire an outside candidate.[3]

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[3] Thus, Mr. Walsh testified as follows: "the Secretary and the new Administrator had come on board and said they wanted to have a full staffing level, and we felt that the only way we could get up to the full staffing level was to go to the outside and select outside candidates, in most instances, after we had given special consideration."

Mr. Steel testified that the handling of hazardous materials is a critical element and performance standard for a GS-12 Railroad Safety Inspector, the open position in Fort Worth, and that he has consistently received the highest evaluation possible for both the performance standard and the critical element.

Discussion and Conclusions

The General Counsel, relying primarily on the reasons assigned on May 20, 1985, by Respondent for Mr. Steel's non-selection, i.e. "maintenance of staffing levels", takes the position that inasmuch as the arbitrator had specifically found such reason to be an insufficient basis for denying Mr. Steel's transfer in the first instance, Respondent's continued reliance on staffing levels as a reason for Mr. Steel's non-selection was contrary to the arbitrator's award and hence violative of Sections 7116(a)(1) and (8) of the Statute.

The General Counsel would give no credence to the other reasons assigned by Mr. Walsh for the non-selection of Mr. Steel for the Fort Worth vacancy since such reasons were first announced over a year after Mr. Steel's second non-selection and only after unfair labor practice charges had been filed challenging the procedure utilized in the re-run selection procedure. Finally, the General Counsel would find that the formulation and presentation of a list containing only in-house candidates to the selecting official was a token gesture, and without more, did not establish the "special consideration" called for in the collective bargaining agreement. Finally, the General Counsel would find that the re-run selection procedure was a sham and that it failed to accord any "special consideration" to in-house candidates.

The Respondent, on the other hand, takes the position that the establishment of a list containing only in-house candidates fulfilled the requirement of "special consideration" to be accorded in-house candidates set forth in both the collective bargaining agreement and the arbitrator's decision. Additionally, it is the position of the Respondent that it only cited "maintenance of staffing levels" in the first instance as the reason for Mr. Steel's non-selection for the Fort Worth vacancy in order to prevent a morale problem which could arise by telling an employee that he was not selected because he was unqualified. Accordingly, inasmuch as the arbitrator's award made it clear that absence of qualifications was a legitimate reason for non-selection, Respondent urges dismissal of the instant complaint.

A review of the respective positions of the parties makes it clear that resolution of the instant controversy turns on whether or not in-house candidates were accorded "special consideration" during the re-run selection procedure utilized to fill the Fort Worth vacancy.

On the surface it would appear that constructing and presenting a list of applicants consisting of only in-house candidates for first consideration for available job vacancies would satisfy the "special consideration" provision of the collective bargaining agreement. However, such procedure would certainly fail to so qualify as "special consideration" if it were established that the selecting official entered into the selection process with a predetermined intent to "maintain staffing levels". This is particularly true in the instant case in view of the arbitrator's specific rejection of "maintenance of staffing levels" as a legitimate reason for non-selection of in-house candidates, who otherwise, qualified for the Fort Worth vacancy.

Taking the record as a whole, including my observation of the witnesses and their demeanor, I find that the Respondent had no intention of hiring an in-house candidate during the re-run selection process because it wanted to maintain staffing levels. In support of this conclusion I rely on Mr. Walsh's testimony that the only way Respondent could maintain staffing levels was to select outside candidates after giving inside candidates "special consideration". Having maintenance of staffing levels in mind, I find, in agreement with the General Counsel, Respondent was only going through the motions when it made up a special list of in-house candidates for initial consideration for the Fort Worth vacancy. Additionally, I find that Mr. Walsh's testimony supports the conclusion that while experience in handling of hazardous materials might have been a consideration in the decision not to hire Mr. Steel for the Fort Worth vacancy, maintenance of staffing levels was also a consideration.

Accordingly, since the arbitrator has specifically rejected "maintenance of staffing levels" as being a legitimate reason for failing to give "special consideration" to in-house candidates, I find that by again relying on the same reason in the re-run selection procedure, Respondent failed to comply with the arbitrator's award and thereby violated Sections 7116(a)(1) and (8) of the Statute.[4] U.S. Marshals Service & AFGE, AFL-CIO, International Council of Marshals Service Locals, 13 FLRA 351.

Having found and concluded that the Respondent has violated Sections 7116(a)(1) and (8) of the Statute, I recommend that the Federal Labor Relations Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, 5 USC Section 7118, it is ordered that the Federal Railroad Administration shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with Arbitrator Seymour Strongin's December 9, 1982 arbitration award, as modified.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Re-run the selection action for Railroad Safety Inspector (Hazardous

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[4] In reaching the foregoing conclusions I have given little weight to Mr. Walsh's statements made after the filing of the charges underlying the instant Complaint. Having assigned "maintenance of staffing levels" as the reason for Mr. Steel's rejection for the Fort Worth position in the first instance, Respondent should be forced to defend its action on such ground. To allow Respondent to subsequently proffer other reasons for its actions puts both Mr. Steel and the Union at a distinct disadvantage should they decide to question compliance with the collective bargaining contract through the grievance procedure. To hold otherwise would be condoning deception.

Materials) GS-12 position Fort Worth, Texas, in compliance with Arbitrator Seymour Strongin's December 9, 1982 arbitration award, as modified.

(b) Post at the Federal Railroad Administration's Regional Offices throughout the United States, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region 3, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: September 15, 1986
Washington, D.C.

[3-CA-50355]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with Arbitrator Seymour Strongin's December 9, 1982 arbitration award, as modified.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL re-run the selection action for Railroad Safety Inspector (Hazardous Materials) GS-12 position for Fort Worth, Texas in compliance with Arbitrator Seymour Strongin's December 9, 1982 arbitration award, as modified.

____
(Agency or Activity)

Dated: ________________ By: __________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 3, whose address is: 1111 - 18th Street, NW., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8452.

[8-CA-60087]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NAVAL SUPPLY CENTER
SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 8-CA-60087
and 8-CA-60088

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1399

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 30, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., October 31, 1986.

Harold D. Kessler
Director of Case Management

[8-CA-60087]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. NAVAL SUPPLY CENTER
SAN DIEGO, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1399, AFL-CIO

Charging Party

Case Nos. 8-CA-60087
8-CA-60088

Deborah S. Wagner, Esq.
For the General Counsel

Mr. Basil L. Mayes
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq. (herein called the Statute). It was instituted by the Regional Director of Region 8 based upon an unfair labor practice charge filed on December 17, 1985 and amended on March 3, 1986, by the American Federation of Government Employees, Local 1399, AFL-CIO (herein called the Union) against U.S. Naval Supply Center, San Diego, California (herein called Respondent). The consolidated Complaint alleged that Respondent violated section 7116(a)(1), and (5) of the Statute by unilaterally changing a past practice by refusing to release bargaining unit employees on official time to meet with union representatives regarding employee complaints not yet filed as formal grievances under the negotiated grievance procedure, without first notifying and giving the union an opportunity to bargain over the change.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in San Diego, California at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the parties and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Respondent operates facilities in San Diego with employees located at various sites throughout the area, including the Broadway facility in downtown San Diego, the National City Annex about five miles south of the city, and the North Island facility, located approximately seven miles from downtown San Diego. Homer Price, a union steward, is employed at the National City Annex. Lynn Gutierrez the other union steward involved in this matter is employed at the North Island facility.

1. The National City Annex Incident

About December 5, 1985, an argument occurred between two employees in the Receipt Control Section of the Material Department at the National City Annex. One employee, Gladys Terrell, picked up a batch of work material and returned to her terminal, where she discovered she had the wrong batch. Terrell returned that batch, and took the appropriate one. However, another employee later confronted her, claiming that she had taken the batch out of sequence, and an argument between the two ensued. When the argument ended, Terrell requested sick leave and left her work area. Shortly thereafter, Terrell returned to the work area with a union steward, Roger Grainger. Steward Grainger requested that Terrell's supervisor, Winnie Stanfield, give her a dispensary slip to allow her to go to the dispensary, and Stanfield agreed. After Terrell left for the dispensary, Grainger spoke briefly with Stanfield requesting that he come back that afternoon and talk to Stanfield, Terrell and possible some of the employees concerning the incident. Stanfield told him that would be fine. Grainger however, realized later that he would not be able to keep his appointment that afternoon and requested Homer Price, another steward fill in for him. Price agreed to take Grainger's place and contacted Stanfield to inform her of the change in stewards. Stanfield verified that Grainger had set up the meeting and told Price it would be all right for him to take Grainger's place that afternoon.

At approximately 12:30 or 1:00 p.m. that afternoon, Price arrived in the work area. He first spoke with Terrell for about 15-25 minutes. After speaking with Terrell, Price returned to Stanfield and asked to talk with her or with the other employees who had witnessed the incident. Stanfield then informed Price that if he wanted to speak with Stanfield or with other employees within her area, he would have to file a grievance first. Stanfield denies making this statement. Price explained that he wasn't there to file a grievance, but only wanted to do an investigation pertaining to a potential grievance. Stanfield recounted to Price the previous problems she had with Terrell and also told him about the number of hours she had spent counselling Terrell. Price then repeated that he was only looking into a potential grievance rather than filing a grievance, and he wanted to do a full investigation in order to fulfill his obligation as a representative. Stanfield told him he ought to speak with the Union's Chief Steward, Larry Cooper, and follow the contractual grievance procedure. She then told Price she did not have anything else to say to him pertaining to the incident, repeating that if Price wanted to talk to her or other employees in her immediate area he would have to file a grievance and go through the Labor Management Relations Office. The conversation ended, and Price left the area.

Stanfield's version differs somewhat. According to her, she told Price that because of the incident, no work had been done all morning. She said she would be willing to talk to Price, but at another time. She also did not feel she should pull employees away from their work any longer that day, due to the fact that they were working on a time frame. The record does not disclose what time frame existed. In addition, Price denies that Stanfield made statements concerning time frames. I credit Price. Stanfield claims that after telling Price this he became irate and said "You'd better talk to me right now." Stanfield replied that it sounded like Price was threatening her.

Stanfield acknowledged that she had previously agreed to allow the Union to speak with herself and other employees, when she spoke with Grainger, then suddenly withdrew that agreement only after the steward was actually present and prepared to speak with those individuals. Notwithstanding her agreement, Stanfield did not call either Grainger or Price prior to the meeting to cancel. Nor did Stanfield suggest any alternative times for the meeting, although Article 7, Section 4 of the negotiated agreement requires her to do so.[1]

Price who had been a steward for about three years filed approximately nine grievances a year. Further Price investigated employee problems which did not result in a grievance being filed on 18 or so occasions. On all those occasions, Price never had a supervisor tell him he had to file a grievance prior to talking with employees or supervisors about an employee problem or about those investigations.

2. The North Island Incident

Lynn Gutierrez as already noted, is an employee and union steward at Respondent's North Island facility. Sometime in early December 1985, several employees approached Gutierrez and told her they were having a problem getting their annual leave granted and asked her to look into the situation. All of the complaining employees worked in the Receipt Processing Section where they were supervised by Henrietta Denoyer. Around December 6, 1985, Gutierrez met with Ralph Romero, Division Director of Receiving, concerning the leave policy for the upcoming Christmas holiday period. In that meeting Gutierrez allegedly discussed problems employees related to her about leave they were having in the Receipt Processing Section. Gutierrez inquired of Romero what the leave policy was around holidays. Romero said he liked to let about 25 percent go, but it depended on the workload, and he could not project too far in advance. He further stated that if an employee had plane tickets or something like that they wouldn't cancel that kind of scheduled leave, but it depended on the workload and the supervisor would have to make the final choice. Romero also stated he was already aware of the leave problem because he had received a letter from an employee in Receipt Processing Gutierrez and Romero then agreed that each would investigate the problem and get back together. Romero's recollection of the meeting differs somewhat as he recalls Gutierrez approached him and asked to see one of the employees in the Receipt Processing Section. Romero asked why, and Gutierrez replied that there was a possible problem. Romero then said, okay, and told Gutierrez to contact Henrietta, the first line supervisor. Romero denied that Gutierrez discussed the leave policy with him, but acknowledged he was aware of one employee who had a problem with leave because that employee had written a letter to him. Romero had scheduled an appointment with the employee for that same afternoon. I credit Gutierrez.

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[1] Article 7, Section 4 provides, in pertinent part,

> "The permission shall be granted unless workload will not permit. In this case an estimate of when permission can be granted will be given."

Gutierrez then went to see Henrietta Denoyer and asked permission to speak with some of her employees. Denoyer inquired at least twice what the problem was, but Gutierrez declined to answer, saying it was a potential problem, but she didn't want to answer the question yet, as it was too premature. Denoyer then asked who Gutierrez wanted to speak to, and Gutierrez gave her about four names. Denoyer instructed her to start with the two employees who were working outside. Gutierrez agreed and began with the first employee for about ten minutes and proceeded to talk with a second employee for about 20 minutes. When she finished she went back inside and told Denoyer that she was ready to talk to the other employees. At this point, Gutierrez gave Denoyer two additional employees that she wished to interview. These names were given to her by one of the employees she had just talked to, who claimed the additional employees were having the same problems with their leave. Denoyer then requested that Gutierrez come back in an hour because there was work to be done. Gutierrez agreed, and returned to her own work site.

Approximately one hour later, Gutierrez returned and informed Denoyer that she was ready to continue the investigation. Denoyer again questioned her about the nature of the problem. Gutierrez repeated that it was too premature to discuss it. Denoyer then told Gutierrez that under Article 8, Section 6 of the Negotiated Agreement, she could not speak to the employees until after a grievance was filed. Gutierrez replied that was ridiculous and pulled out her copy of the agreement.[2] While they were looking at the contract, Gutierrez informed Denoyer of her understanding with Romero that she would conduct an investigation and then get back together with him. Gutierrez invited Denoyer to call Romero and verify the understanding. Denoyer called Romero and spoke with him for a few minutes. When she got off the phone, Denoyer told Gutierrez, Romero thought she was only going to talk to one employee, that he knew of only one employee with a complaint tnat he got a letter from, and this was the only employee he wanted Gutierrez to talk to. Gutierrez said she would go talk to Romero.

Denoyer testified that Gutierrez came to her area the morning of December 6 and asked to speak to "four or six" of her employees. Denoyer allowed her to speak with two of the employees, then asked her to come back an hour later. Gutierrez agreed, but when she returned an hour later, Denoyer claims she was led to believe Gutierrez wanted to talk with all 15 of her employees, so Denoyer asked her to come back later to do that, since Friday was such a busy day for them. Gutierrez then left saying she was going to see Romero and never returned. Denoyer denies ever saying to

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[2] Article 8, Section 6 of the parties negotiated agreement reads as follows:

> Section 6: The following procedure shall apply in processing employee grievances and shall be the exclusive procedure available to the Parties and the employee for resolving such grievances. A thorough investigation of all grievances shall be conducted, and employees and supervisors who have knowledge of the facts directly involved in the grievance may be called by either Party to provide information. The written grievance shall contain: (1) identity of grievant; (2) the specific issues and details of the grievance and the specific provision of this AGREEMENT if involved; (3) the corrective action desired that will provide personal relief to the employee; and, (4) the name of the Union steward if representation is desired by the employee.

The Section then continues by setting out the various steps to negotiated grievance procedure.

Gutierrez that she could not see any more employees unles she filed a grievance. However, this testimony is not credible. Clearly Denoyer admitted that Gutierrez never told her that she wished to speak with all 15 employees. Denoyer apparently jumped to that conclusion for no appar reason, thereby creating an unfounded belief that Gutierr investigation would disrupt the shop on a busy day. I credit Gutierrez.

Gutierrez returned to Romero's office and told him sh thought they had an understanding, that they would each conduct an investigation and get back together. Romero t her he only had a letter from one employee, so he thought she was only going to talk to one person. Gutierrez remi him that she had previously explained that several employ in that section had the same problem with the approval of their leave, and those were the only employees to whom Gutierrez was speaking. Romero replied that he couldn't have Gutierrez talking to all those employees, there woul have to be "something more formal" before she did an investigation. Gutierrez told him that was ridiculous, because the point was always to try to resolve things informally before filing anything formal and a lot of tim things were resolved in that manner. Romero thought for moment, then said he would talk to Judy Larson, who is Denoyer's supervisor, and a member of the management negotiating team in the contract negotiations which were taking place at this time. Romero left the room for a fe minutes. Upon returning he told Gutierrez that he was sorry, but until a grievance was filed Gutierrez could not meet with the employees. He further informed her that he would investigate the matter himself, and if he couldn't work it out, the employee would have to file a grievance before Gutierrez could talk to her. Gutierrez then repeated, to ensure that there was no misunderstanding: "So you're saying that before I . . . can interview these employees, you're telling me that they have to file a grievance?" Romero told her yes, and she thanked him and left.

Romero testified that upon returning to his office Gutierrez asked him whether it was true that he didn't wan her to see all the employees. According to Romero, he tol Gutierrez that she only asked to see one employee that morning, which he approved and told her to go ahead and se Henrietta and talk to the employee. Then he started to sa "Today [is] Friday . . ." but Gutierrez walked out of the room before he finished his sentence.

In the approximate year she has been a steward, Gutierrez has been very active in investigating employee complaints as much as several times a week. During that period she had no previous difficulties in getting official time to investigate employee problems. According to Gutierrez she had handled about eight previous employee complaints against Denoyer without experiencing any difficulty in talking with employees on official time. The refusal to allow Gutierrez to interview employees for the purpose of investigating an employee complaint was a first and a change in previous practice as far as she was concerned.

Sometime around August 1985, the Union and the Respondent began negotiations on a new collective bargaining agreement. These negotiations were still in progress on December 5 and 6, 1985, when the two incidents involving union stewards Price and Gutierrez took place. At that time Price and Gutierrez both members of the Union's negotiating team, as was Larry Cooper, the Union's Chief Steward and Acting President. Judy Larson, Gutierrez' second line supervisor, and Hans vonNostitz, the Director of Labor Management Relations, were part of management's negotiating team. According to Price and Cooper, during negotiations, management proposed that a grievance must be filed before a union steward be released on official time to meet with an employee or a supervisor. Respondent's Chief negotiator, vonNostitz explained that in his view, it would be redundant, or a duplication of effort, for a Union steward to talk with a supervisor in an attempt to informally resolve a problem, then turn around and meet with the same supervisor again at the first step of the grievance procedure if the attempt is not successful. According to Price, vonNostitz also mentioned that it would allow the Respondent to have a better record of the number of grievances and potential grievances a union steward worked on. Cooper stated, the Union's position was that this approach was counterproductive, as it felt union stewards had been successful in the past in having problems resolved informally. The Union believed during bargaining that filing grievances formally could sometimes lead to bad feelings between the employee and the supervisor. The Union desired an investigation before filing a grievance so that it could determine whether the individual's complaint had any merit. In this way it could reduce the number of frivolous or unnecessary grievances.

Mr. vonNostitz testified that he had no objection to a union steward talking to a complaining employee prior to filing a grievance, but he was proposing that a grievance be filed before any union steward could discuss a problem with a supervisor. In any case, he did not explain whether Respondent's proposal would prohibit a steward from interviewing potential eyewitnesses or otherwise conducting an investigation into the problems raised by a complaining employee. However, both Price and Cooper testified that the proposal would have prohibited talking to employees prior to filing a grievance. No agreement was reached at the table regarding this issue. Finally, vonNostitz denied that he told Stanfield, Denoyer, Romero or any other supervisor that a grievance must be filed before the union may investigate a possible grievance.

Conclusions

The threshold question in these cases is whether or not a practice of allowing union representatives to investigate matters without filing a grievance existed at Respondent's two facilities herein. The General Counsel argues that such a practice was in existence which allowed union stewards to meet not only with employees, but with supervisors in conducting investigations of employee complaints before making its decision as to whether or not a grievance should be filed.

Respondent contends that no such practice existed which could be violated. Respondent asserts that the established practice is only that a steward is allowed to talk with employees before filing a grievance therefore, no practice of talking with or investigating supervisors action prior to filing a grievance existed. Notwithstanding its position that no past practice existed, Respondent's basic argument is that credibility determination favorable to its witnesses Stanfield, Denoyer and Romero should be made. The undersigned is not prepared to make such determinations wholly credible to those witnesses.

It is undisputed that union stewards, Price and Gutierrez, prior to the incidents involved in this matter, conducted investigations on matters preliminary to filing grievances and that at least Price, in investigating complaints talked with both supervisors and employees. It is also clear that Respondent's supervisors allowed or acquiesced in investigations involving stewards and supervisors and that even on the occasions herein they allowed investigations to begin, before changing their minds about whether stewards were allowed to investigate a matter preliminary to filing a grievance. Furthermore, Respondent's position during bargaining regarding procedures for handling employee complaints prior to a formal grievance being filed makes it clear that it had no objections to stewards talking with employees prior to filing grievances. It objected only to their talking with supervisors. Implicit in its proposal that a grievance must be filed before a steward is released is the suggestion that stewards were meeting with employees and supervisors before filing grievances, a practice which Respondent wanted stopped. The proposal in my view buttressed the position that a practice of investigating complaints prior to filing a grievance did exist. Accordingly, it is found that a past practice of allowing investigations on official time before the union filed a grievance at Respondent's facilities existed prior to December 1986. Department of Housing and Urban Development, 17 FLRA 461 (1985).

In Case No. 8-CA-60087, Respondent contends that the union steward was not entitled to duty time in order to conduct an investigation of one employees' complaint against another. This position misses the point which is whether the exclusive representative is entitled to investigate and examine possible grievances as it had done in the past. The investigation could have revealed, as has been suggested, that no further action was necessary. Although it became clear at the hearing that the matter was merely an employees' complaint it may have been clear to the steward, only after investigation that such was the case. Further, entitlement to time is controlled by the past practice of allowing such time and its change in my view negotiable. The only issue here is whether the union can investigate in order to determine whether or not to file a grievance as it had in the past. Since, the record shows no practice of Respondent limiting investigations for any particular reason it appears that if it wanted to change this particular practice it would be required to give the Union notice and an opportunity to bargain concerning the change. Therefore, Respondent's position that the union steward was not entitled to duty time to investigate the matter is rejected.

Respondent also raises a question of whether supervisors may legally request, due to work load that the exclusive representative conclude an investigation at another time. Respondent sees this as the issue in Case No. 8-CA-60088. That is not this case. There is no contention that a delay in the investigation caused by work load was violative of the Statute. The question here is whether preventing preliminary investigations where an established practice existed which allowed such investigations to take place violates the Statute. Consequently, cases such as Federal Railroad Administration, 21 FLRA 68 (1986) are inapplicable.

I agree with the General Counsel that the "work load" defense in the instant cases is an after the fact excuse rather than an accurate recounting of the events. Further, it appears from the contractual language that the Respondent can raise work load, but at the same time it must make an estimate of when permission to investigate will be granted. As already stated, the investigation here, according to credited evidence was precluded. Accordingly, I reject Respondent's defense that work load considerations barred the instant investigations.

It is my view, based on the above, that the General Counsel established by a preponderance of the evidence that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally requiring union stewards to file a grievance prior to investigating an employee problem, without first notifying and providing the exclusive representative in this matter the opportunity to bargain concerning the change.

I also agree with the General Counsel that a status quo ante remedy is appropriate herein since the extent of the impact of the change on bargaining unit employees is not relevant.

Having found that Respondent committed certain unfair labor practices it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations of section 7118 of the Statute, it is hereby ordered that the U.S. Naval Supply Center, San Diego, California shall:

1. Cease and desist from:

    (a) Unilaterally implement changes in the working conditions of bargaining unit employees by changing the existing procedure by which representatives of the American Federation of Government Employees, Local 1399, AFL-CIO, the exclusive representative of certain of our employees, are released on official time to interview employees regarding complaints not yet filed as formal grievances under the parties' negotiated grievance procedure, without first notifying the Union and affording it an opportunity to bargain about such change.

(b) In any like or related manner, interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Restore to American Federation of Government Employees, Local 1399, AFL-CIO the right to utilize the existing established procedures in obtaining official time to meet with unit employees regarding complaints not yet filed as formal grievances under the negotiated grievance procedure.

(b) Notify the American Federation of Government Employees, Local 1399, AFL-CIO in advance of any intended changes in working conditions of unit employees regarding procedures of obtaining official time to meet with unit employees and, upon request, bargain about such changes.

(c) Post at all its U.S. Naval Supply Center, San Diego, California locations the attached Notice marked "Appendix A" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Eli Nash, Jr.
ELI NASH, JR.
Administrative Law Judge

Dated: September 30, 1986
Washington, D.C.

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in the conditions of bargaining unit employees by changing the existing procedure by which representatives of the American Federation of Government Employees, Local 1399, AFL-CIO, the exclusive representative of certain of our employees, are released on official time to interview employees regarding complaints not yet filed as formal grievances under the parties' negotiated grievance procedure, without first notifying the Union and affording it an opportunity to bargain about such change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL restore to the American Federation of Government Employees, Local 1399, AFL-CIO the right to utilize the existing established procedures in obtaining official time to meet with unit employees regarding complaints not yet filed as formal grievances under the negotiated grievance procedure.

WE WILL notify the American Federation of Government Employees, Local 1399, AFL-CIO in advance of any intended changes in working conditions of unit employees regarding procedures of obtaining official time to meet with unit employees and, upon request, bargain about such changes.

(Agency or Activity)

Dated: ______________ By: ______________________
(Signature)

This Notice must remain posted for 60 consecutive days fro the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 8, whose address is: 350 S. Figueroa Street, 10th Floor, Los Angeles, CA 90071 and whose telephone number is: (213) 688-3805.

[7-CA-60121]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 7-CA-60121

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 25, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., October 31, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[7-CA-60121]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1592

Charging Party

. . . .

Case No.: 7-CA-60121

Clare A. Jones, Esquire
For the Respondent

Eileen B. Quigley, Esquire
Joseph Swerdzewski, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et. seq.,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent told an employee that if he filed a contractual grievance his performance appraisal might be lowered, in violation of § 16(a)(1) of the Statute.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(1) will be referred to, simply, as "§ 16(a)(1)."

This case was initiated by a charge filed on January 16, 1986 (G.C. Exh. 1-a.). The Complaint and Notice of Hearing issued on February 26, 1986 (G.C. Exh. 1-b) and set the hearing for April 3, 1986. By Order dated March 18, 1986 (G.C. Exh. 1-c), the hearing was rescheduled for May 15, 1986, and by Order dated May 7, 1986 (G.C. Exh. 1-f), the hearing was further rescheduled for May 22, 1986, pursuant to which a hearing was duly held on May 22, 1986, in Ogden, Utah, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues presented, to examine and cross-examine witnesses, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, June 23, 1986, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on, or before, June 24, 1986, which have been carefully considered. Upon the basis of the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees, Council 214 (Council 214) is the exclusive representative of a nationwide bargaining unit of non-supervisory and non-professional employees of the Air Force Logistics Command, including employees of the Ogden Air Logistics Center, Hill Air Force Base, Utah. American Federation of Government Employees, AFL-CIO, Local 1592 (hereinafter referred to as the "Union") is a constituent part of Council 214 and represents, as agent of Council 214, employees at the Ogden Air Force Logistics Center.

2. On December 17, 1985, Mr. Clayton B. Lund, a sheet metal mechanic in the Maintenance Division at Hill Air Force Base, filed a first step grievance concerning his having been charged with two hours AWOL (G.C. Exh. 2, Tr. 24, 62). Union Steward, John Scott Blanch, also a sheet metal mechanic

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[2] General Counsel filed a motion to correct transcript, to which no opposition was filed, and, finding the requested corrections wholly proper, the motion is granted. The transcript is hereby corrected as set forth in the Appendix.

(Tr. 61), represented Mr. Lund throughout the processing of the grievance (Tr. 24-27, 51, 62, 63, 64, 68-69). The grievance was not resolved at the first step and Mr. Blanch informed Mr. Lund of management's decision and advised Mr. Lund to grieve it formally and go to step two (Tr. 27, 64).

3. On the morning of December 30, 1985, Mr. Blanch told Mr. Lund during the first break that he had written a rough draft of the grievance and that he, Lund, should go to his supervisor to request an hour of official time to go to the Union office to review the draft and prepare the necessary paperwork (Tr. 27, 28, 65).

4. At about 9:30 a.m., Mr. Lund went to the office of his immediate supervisor, Mr. Harvey B. Healey. Mr. Healey was a new supervisor, having become a supervisor, and Mr. Lund's immediate supervisor, on December 21, 1985 (Tr. 82-83). Mr. Lund testified that he asked Mr. Healey for official time to go to the Union office to prepare the paperwork for a grievance (Tr. 28). Mr. Lund stated that Mr. Healey asked him if he were filing a grievance on him; that he, Lund, said, ". . . no, that I was not, that it was a management decision." (Tr. 28). Mr. Lund testified that Mr. Healey then said that, ". . . if I was to file a grievance he would probably have to knock my appraisal down." (Tr. 28). Mr. Lund said that he, ". . . said to him that I didn't think it should, and that filing a grievance should not affect my appraisal one bit" (Tr. 28), to which Mr. Healey responded, ". . . if the higher-ups above him told him he had to that he would." (Tr. 28). Mr. Healey admitted meeting with Mr. Lund; that Mr. Lund asked for, ". . . an administrative permit to go to - I believe it was 225 . . . which I did grant at that particular time" (Tr. 85). Mr. Healey testified that he said, "I just merely stated the fact that what would this do to your appraisal, period." (Tr. 86, 96).

5. Mr. Lund testified that he was so upset by Mr. Healey's statement that he went out to the shop floor where Mr. Blanch was working (about fifty feet from Healey's office) and asked him, ". . . if it was right for management to do such a thing as knock my appraisal down . . . that Mr. Healey had told me that he would knock my appraisal down if I filed a grievance." (Tr. 29). Mr. Blanch asked Mr. Lund to accompany him to Mr. Healey's office, that he, Blanch, ". . . would like to hear it for himself. . . ." (Tr. 29). Whereupon, Messrs. Blanch and Lund immediately went to Mr. Healey's office.

Mr. Lund testified as follows:

> ". . . Mr. Blanch asked him [Healey] if he had, indeed, threatened my appraisal.
>
> "Mr. Healey looked at Mr. Blanch for a moment, turned to me, and asked me what he had said.
>
> "I said that he had said that if I filed a grievance he might have to knock my appraisal down.
>
> "And he, in turn, said that I'm only stating if my boss tells me to I'll have to. And I think it will, and it probably will." (Tr. 30).

Mr. Blanch testified as follows:

> "I walked in. And Mr. Healey pulled out the slip and says, you need an hour's time to prepare your grievance.
>
> "And I just -- and I just butted in. I says, did you tell Clay if he filed this grievance you would knock him down on his appraisal?
>
> "Mr. Healey looked at Clay, says, Clay knows what I said.
>
> "I said, that's not what I asked you. Did you tell him if he filed this grievance he'll be knocked down on his appraisal?
>
> "Mr. Healey says, the way I understand it, if it comes from above, I've got to do what I've got to do. I assume that's the way it is." (Tr. 67, 73-74; Res. Exh. 1).

Mr. Healey testified as follows:

> "A. Well, Mr. Scott Blanch came in and made a statement, did you make this statement.

"And, to my surprise, I didn't quite relate to what statement he was referring to. And, at that particular time, I turned to Mr. Lund and asked what did I say, what particular statement did I say?

"Q. And what did Mr. Lund say then? Do you recall?

"A. Well, he made a statement to the effect of what I said, which was referring to that particular incident, how would this affect your appraisal.

. . .

"Q. Let me ask you this. Did Mr. Lund, at that point in time, accurately represent to Mr. Blanch what he had said during the course of your previous meeting or was it different?

"A. He stated -- I wouldn't say verbatim, but to near abouts, in the same general sense.

"Q. . . .

Did you, at any time during your meeting with Mr. Blanch and Mr. Lund, say words to the effect that the way you understood it, that if came down from above, that you would be obligated or required to lower his appraisal?

"A. No, sir." (Tr. 89-90)

. . .

"And then Mr. Blanch came back with Mr. Lund. Isn't it true that you asked Mr. Lund to repeat that you had said what will this do to my appraisal -- what will this do to your appraisal?

"A. No, ma'am.

"Q. It says here that -- in your statement [Res. Exh. 2], that I asked Mr. Lund to repeat what I said earlier.

"A. Yes.

"Q. And what you had said earlier, it says here in the statement, that you mentioned what this will do to your appraisal, isn't that --

"A. That's what Lund said I said." (Tr. 108).

. . .

"But you did say what will this do to your appraisal?

"A. Of course.

"Q. . . .

And you also said to Mr. Blanch, at this time, that they, the higher-ups could possibly tell you to do this?

"A. They referring to other -- other supervisors. . . .

"Q. . . .

"So, you did, in fact, tell him that supervisors, your supervisors, may have to do this, is that correct?

"A. They may have to do this?

. . .

"A. No. They, they don't.

"Q. But you -- you -- you said that to Mr. Blanch, then, didn't you, that your higher-ups, they may tell you to do this?

"A. They, referring to whomever, not directly --

"Q. But you did say that?

"A. They, yes." (Tr. 109).

. . .

"A. I just merely made the statement they, what would they think of this or what would they --

. . .

"A. -- would they do.

"Q. What would they do if he filed a grievance?

"A. Not particularly.

"Q. What would they do if he filed this AWOL charge or processed this AWOL charge?

"A. What they would do --

. . .

"Q. What -- what -- what did you tell Mr. Blanch?

"A. I didn't tell him a thing." (Tr. 110-111).

. . .

"Q. . . . What were you telling Mr. Blanch that they may do?

"A. Well, it refers back to the -- to the statement that I made up there in the top there, right where[3] --

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[3] Mr. Healey made a written statement, "To Whom It May Concern" dated April 16, 1986 (Res. Exh. 2) which states, in part, as follows:

"I found out that he was having a hearing on an AWOL charge of 2 hrs. with a representation of a Union Steward. I

(footnote continued)

> "Q. When you gave -- you gave Mr. Lund advise (sic) that what -- what filing the charge may do to your appraisal, just the --
>
> "A. Not per se. No.
>
> . . .
>
> "A. But they -- what are they doing to you, meaning whoever he was involved with. Okay." (Tr. 111-112).

6. After leaving Mr. Healey's office, Messrs. Blanch and Lund went to the Section Office where, while Mr. Lund waited outside, Mr. Blanch went in and informed second line supervisors Messrs. Al Cummings and Larry Mann that Mr. Healey had threatened an employee with reprisal for filing a grievance. Mr. Blanch stated they responded, "Well, I've got news for Healey. We don't have anything to say on a grievances -- I mean on appraisals. We don't have anything to say on appraisals." (Tr. 68).

7. After leaving the Section Office, Messrs. Blanch and Lund went to the Union office and prepared the grievance (G.C. Exh. 3; Tr. 68). On January 14, 1986, management

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(footnote 3 continued)

> later learned that the 2 hr. AWOL charge was reversed.
>
> "Before I granted the permit I also spoke to Mr. Lund about what was going on and that I wanted to know. So I asked a few more questions about what was going on and what are they doing to you and thats when I mentioned what will this do to your appraisal. I was merely trying to help Mr. Lund with his problem . . . Mr. Blanche asked if I had made that statement, that is when I turned to Mr. Lund and asked him to repeat what I had said earlier and he did. I only admitted in front of Mr. Blanche the word 'they' and then he turned and left. . . ." (Res. Exh. 2).

granted Mr. Lund's request that the AWOL be removed from his record and that his lost overtime be reinstated. (G.C. Exh. 4; Tr. 31, 64).

Conclusions

§ 16(a)(1) of the Statute prohibits an agency from interfering with, restraining, or coercing employees in the exercise of rights protected by the Statute and the rights guaranteed by § 2 of the Statute, inter alia, ". . . to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal. . . .", encompasses the right to file and process grievances and it is both elemental and firmly settled that any interference with the right to file grievances constitutes an unfair labor practice in violation of § 16(a)(1) of the Statute, as it had of § 19(a)(1) of the predecessor Executive Order. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA No. 116, 3 FLRA 723 (1980); Internal Revenue Service and Brooklyn District Office, 6 FLRA No. 111, 6 FLRA 642 (1981); Consumer Product Safety Commission, New York, 10 FLRA No. 72, 10 FLRA 422 (1982); Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA No. 64, 11 FLRA 290 (1983); Social Security Administration, Baltimore, Maryland, 18 FLRA No. 33, 18 FLRA 249 (1985).4/

I found Mr. Lund a very credible witness and conclude, as Mr. Lund testified, that Mr. Healey stated that ". . . . if I [Lund] was to file a grievance he would probably have to knock my appraisal down" and when Mr. Lund protested that filing a grievance should not affect his appraisal "one bit", Mr. Healey responded, ". . . . if the higher-ups above him told him he had to that he would." Mr. Lund, obviously greatly disturbed by Mr. Healey's statement, left Mr. Healey's office and went directly to where Union Steward

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4/ I have given careful consideration to Department of Defense, Department of the Air Force, 325th Combat Support Group, Tyndall Air Force Base, Florida, Case Nos. 4-CA-20441, 4-CA-30445, Administrative Law Judge Decisions Report No. 39 (July 6, 1984), cited and relied upon by Respondent (Respondent's Brief, p. 8), but do not find it in point. Moreover, I specifically do not find that Mr. Healey's statement to Mr. Lund constituted protected expression of a personal opinion; but, rather, find that his statement was an unvarnished threat.

Blanch was working and asked him, ". . . if it was right for management to do such a thing as knock my appraisal down" if he filed a grievance. Mr. Blanch assured him that it was not and asked Mr. Lund to accompany him to Mr. Healey's office. Mr. Lund testified that they immediately went to Mr. Healey's office where Mr. Blanch asked Mr. Healey if he had, indeed, threatened Mr. Lund's appraisal; that Mr. Healey asked him [Lund] what he [Healey] had said and Mr. Lund said that he [Healey] "had said that if I filed a grievance he might have to knock my appraisal down" to which, Mr. Lund testified, Mr. Healey had responded "I'm only stating if my boss tells me to I'll have to. And I think it will, and it probably will". Mr. Blanch, testified that Mr. Healey stated, "the way I understand it, if it comes from above, I've got to do what I've got to do. I assume that's the way it is." I credit Mr. Blanch's testimony in this regard.

I did not find Mr. Healey's testimony convincing, nevertheless, he admitted that, at the least, he had said to Mr. Lund, ". . . the fact that what would this do to your appraisal". Mr. Healey conceded that he asked Mr. Lund to repeat what he [Healey] had said and conceded that Mr. Lund had accurately repeated his statement, "in the same general sense", which, as I find, was that Mr. Healey said, "if I filed a grievance he might have to knock my appraisal down."5/ Mr. Healey did not deny to Mr. Blanch having made the statement, but first asserted he didn't tell Mr. Blanch a thing (Tr. 110-111); however, when further pressed on cross-examination stated that he "only admitted" in front of Mr. Blanch the word "they" (Tr. 109, Res. Exh. 2). This would, to say the least, have made for a very strange conversation and I reject it as being wholly lacking in credibility. Accordingly, I credit the testimony of Messrs. Lund and Blanch and reject the testimony of Mr. Healey. Clearly, Mr. Healey's statement to Mr. Lund that if he filed a grievance he would probably have to knock down his appraisal and his further statement that if the higher-ups told him he had to (lower the appraisal) that he would, violated § 16(a)(1) of the Statute.

Having found that Respondent violated § 16(a)(1) of the Statute, it is recommended that the Authority adopt the following:

5/ I specifically do not credit Mr. Healey's testimony that Mr. Lund stated that Mr. Healey had said "what will this do to your appraisal" (Tr. 108).

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1. Cease and desist from:

(a) Interfering with, or discouraging, by implied threats or other means, including telling employees that if they file contractual grievances their performance appraisals might be lowered, any employee from exercising their rights accorded by the Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at the Ogden Air Logistics Center, Hill Air Force Base, Utah, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region VII, Federal Labor Relations Authority, Suite

310, 535 - 16th Street, Denver, Colorado 80202, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 25, 1986
Washington, D.C.

[7-CA-60121]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, or discourage, by implied threats or other means, including telling employees that if they file contractual grievances their performance appraisals might be lowered, any employee from exercising the rights accorded by the Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

[6-CA-60029]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF
DEFENSE, DEPARTMENT OF THE
ARMY, UNITED STATES ARMY
AIR DEFENSE CENTER AND
FORT BLISS, FORT BLISS,
TEXAS

Respondent

Case No. 6-CA-60029

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R14-89

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 29, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., November 13, 1986.

Harold D. Kessler
Director of Case Management

[6-CA-60029]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF
DEFENSE, DEPARTMENT OF THE
ARMY, UNITED STATES ARMY
AIR DEFENSE CENTER AND
FORT BLISS, FORT BLISS,
TEXAS

Respondent

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R14-89

Charging Party

Case No. 6-CA-60029

Robert A. Mast, Jr., Esq.
For the Respondent

Christopher J. Ivits, Esq.
For the General Counsel of FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

Pursuant to a charge filed on October 23, 1985, by National Association of Government Employees, Local R14-89 (hereinafter called NAGE Local R14-89 and the Union), against the United States Department of Defense, Department of the Army, United States Army Air Defense Center and Fort Bliss, Fort Bliss Texas, (hereinafter called Fort Bliss) the General Counsel of the FLRA, by the Director of Region VI, issued a Complaint and Notice of Hearing on December 30, 1985 alleging that Fort Bliss violated Section 7116(a)(1) and (5) of the Statute by unilaterally requiring employees to wear seat belts and by instituting penalties against employees who fail to do so, without providing the Union proper notice and opportunity to negotiate on the procedure for effecting such a change and appropriate arrangements for employees adversely affected by the change. Fort Bliss filed an Answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in El Paso, Texas. Fort Bliss and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record[1] in this matter, my observation of the witnesses and their demeanor, and my evaluation of the record I make the following:

Findings of Fact

At all time material NAGE Local R14-89 has been the collective bargaining representative for a unit of approximately 1600 employees composed of Fort Bliss' General Schedule appropriated fund employees, with certain exclusions not relevant herein.[2]

Prior to October 1985, bargaining unit employees were not required to wear seat belts while driving at Fort Bliss. On November 22, 1983, Mary Bayer, President, Local R14-89, received a letter dated November 17, 1983, from Colonel Robert J. Leakey, Provost Marshal of Fort Bliss. The letter indicated that Fort Bliss was planning to implement some new proposed traffic regulations and would be interested in the Union's comments. The letter stated that such changes in the proposed traffic regulations affected the civilian work force. Attached to the letter was a proposed supplement to Air Force Regulation 190-5 entitled "Motor Vehicle Traffic Supervision." On page 3 of the supplement, Fort Bliss proposed that operators of privately owned vehicles and their passengers wear approved seat belts or child restraint devices while the vehicle is being operated on the Fort Bliss military installation.

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[1] General Counsel of the FLRA filed a Motion to Correct the Transcript which is unopposed. Accordingly, the motion is hereby granted.

[2] There are four other units on Fort Bliss represented by other labor organizations.

In response to this letter and its attachments, Bayer wrote to Leakey on December 7, 1983, advising him that the Union wished to meet and discuss the proposed changes in traffic regulations. In the spring of 1984, Bayer and the president of the National Association of Government Employees, Local R14-22,[3] met with Fort Bliss representatives in the General's conference room to discuss the proposed changes to traffic regulations. Representing Fort Bliss at the meeting were Colonel Dyer, Chief of Staff; Colonel Russell Parker, Deputy Commander in Chief; Leakey, Colonel Tiedemann, Staff Judge Advocate General, Julio Hernandez, Civilian Personnel Officer, and Eloiso De Avila, Labor Relations Specialist. During this meeting, Parker described the new regulations. One of the issues pertaining to the proposed traffic regulations was the mandatory use of seat belts. At the close of the meeting, Hernandez attempted to paraphrase what happened at the meeting and, in summary, stated "[i]f we (Fort Bliss) go beyond Texas State Law, the Unions will invoke the right to impact and implementation bargain, but if we just enforce what is in the Statute, Texas State Law, then you guys will go along with it.[4] Bayer stated that she wanted to negotiate "if you implement" and left the meeting. The changes to the traffic regulations proposed to the Union in November 1983 were never implemented. Fort Bliss continued to work privately on its proposed traffic regulations. In August 1984, Fort Bliss made plans to employ and design a pink seat belt violation card. In September 1984, Fort Bliss approved the use of a pink seat belt violation card. Fort Bliss began drafting the new seat belt regulation again in October or November 1984. Aside from the November 1983 notification, the Union was not advised further on the seat belt regulation and was not notified when the mandatory seat belt regulation was implemented in October 1985.

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[3] NAGE Local R14-22 represented a unit of about 1100 Wage Grade employees.

[4] At that time there was no Texas State Statute on mandatory use of seat belts.

On October 14, 1985, Joan Foran, Acting President, Local R14-89 saw a notice to employees entitled "Mandatory Use of Seat Belts" in the Fort Bliss Bulletin, Bulletin Number 41, dated October 9, 1985. The notice in the bulletin stated:

> The mandatory use of seatbelts on Fort Bliss will be enforced beginning Monday, 14 October 1985. On that day, military police will issue violators a DD Form 1408 (Military Traffic Ticket) and a pink seat belt violation card. The pink card will notify the violator that he or she will have one point assessed to their driving record and also inform the violator of the appeals process. Texas traffic authorities will also issue warning citations until 1 December 1985. After that time any violators cited by Texas authorities will be issued citations for $25/$50 fines. Commanders/ supervisors at all levels should stress the necessity for compliance to this change, insuring that all individuals adhere.

Not having been notified of this new seat belt policy at Fort Bliss, Foran called De Avila to discuss the notice in the bulletin. She asked him if he was familiar with the notice. De Avila indicated he was not aware of it. Foran indicated that NAGE Local R14-89 wanted the new policy rescinded as it had not been notified, and so the Union could discuss the impact and implementation of the new regulation. De Avila told Foran he would get back to her on it. The following day, De Avila called Foran and told her that the new seat belt regulation would not be rescinded. Foran indicated that the Union "had no alternative but to file an unfair labor practice charge" over the new regulation. De Avila advised her not to file an unfair labor practice charge as the Provost Marshal was going to be a nice guy and only charge $25 for the fine, but if the Union filed an unfair labor practice charge he was going to charge $25 to $50 for each citation.5/

5/ In this regard I credit Foran's version of the conversation. De Avila's testimony differed from Foran's but was not too inconsistent with it.

Thereafter, on October 23, 1985, Foran, in her capacity as acting president for the Union, filed an unfair labor practice charge in the subject case. NAGE Local R14-89 did not receive a copy of the seat belt regulation until January 1986. There had been no seat belt rule at Fort Bliss prior to the implementation of the new seat belt regulation on October 14, 1985. Employees had not been required to wear seat belts.

Prior to the implementation of the seat belt regulation, employees were not subject to monetary fines for failing to wear seat belts. Employees were not subject to seat belt checks at roadblocks. Employees were not subject to a one-point assessment against their driving record for failing to wear seat belts. On October 14, 1985, when the new seat belt policy went into effect, employees became subject to Fort Bliss' sanctions and enforcement procedures for failing to wear seat belts. Initially, employees were subjected to a one-point assessment against their driving records for failing to wear seat belts. The point system is a cumulative system whereby employees can lose their driving privileges if they accumulate too many points. Employees are allowed 12 points in a 12-month period and 18 points in a 24-month period. It is possible to receive points against one's driving record for a number of different traffic violations. Following October 14, 1985, employees who failed to wear seat belts were charged with a point against their driving record and issued a pink seat belt violation card and warning citation. Also, following October 14, 1985, employees were subjected to seat belt roadblock checks. In January 1986, Fort Bliss began issuing monetary fines to employees who failed to wear their seat belts. The fines ranged from $25 to $50. Nine hundred and forty nine (949) tickets had been issued since the new seat belt policy has been implemented. Fifteen (15) civilian employees had been ticketed, one of whom belonged to the Union's bargaining unit. All 1,600 bargaining unit employees are affected by the new seat belt policy. It affects employees who drive to work and also affects employees who are required to drive on base as a part of their regular duties. Further, such sanctions affect Union officials who are required to travel around the base as a part of their representational duties. Employees have been stopped by military police in roadblocks set up to check whether employees were wearing their seat belts. Some employees have arrive to work late because of such a road block and such enforcement tactics have a reasonably foreseeable effect of making other employees late to work and hampering those employees who are required to drive as a part of their official duties. The new seat belt policy also applies to those employees who, for a variety of reasons, cannot and do not wear seat belts including handicapped employees at Fort Bliss who, due to a physical disability, cannot wear seat belts.

The Union wanted to negotiate the seat belt policy as it had concerns on how it would be implemented, what kind of sanctions would be applied to violators of the policy, what kind of accommodations would be made for those employees who lost their driving privileges as a result of the seat belt policy, who would enforce the policy, how would it be enforced, and whether there would be an appeals process.

Discussion and Conclusions of Law

General Counsel of the FLRA contends that Fort Bliss violated Section 7116(a)(1) and (5) of the Statute when, on October 14, 1985, it unilaterally changed working conditions at Fort Bliss when it implemented its mandatory seat belt policy without prior notice to or bargaining with NAGE Local R14-89 over the procedures to be observed in implementing the change and appropriate arrangements for employees affected by the new mandatory seat belt policy.

Fort Bliss contends that it didn't violate the Statute because the new seat belt rule was not sufficiently related to terms and conditions of employment to require negotiation over its implementation and, even if the new seat belt policy was sufficiently related to terms and conditions of employment, its impact on the bargaining unit is de minimis.

Section 7106(b)(2) and (3) provides:

> "(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --
>
> (1) . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Section 7116(a)(5) of the Statute provides it is an unfair labor practice for an agency "to refuse to consult or negotiate in good faith with a labor organization or required by this Chapter."

The FLRA has long held that when an agency exercises its rights granted by Section 7114(a) and (b) of the Statute to unilaterally change terms and conditions of employment, the agency's failure to fulfill its obligations, as required by Section 7114(b)(2) and (3) to notify the appropriate labor organization and to bargain concerning the procedures for implementing the change and the appropriate arrangements for employees adversely affected[6] constitutes a violation of Sections 7116(a)(1) and (5) of the Statute. e.g. U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA 454 (1985); U.S. Department of Labor Employment Standards Administration Wage and Hour Division, 21 FLRA 484 (1986), and Philadelphia Naval Shipyard, Department of the Navy, 15 FLRA 26 (1984).

On October 14, 1985 Fort Bliss instituted a new policy requiring all employees to wear seat belts while driving on Fort Bliss. Failure to comply resulted in a one-point assessment against the employee and starting January 1, 1986, Fort Bliss started issuing monetary fines to employees.

I conclude that such a change, implemented by Fort Bliss, required appropriate advance notice to the Union, to permit the Union to bargain about the impact and implementation of the change.[7] In this regard Fort Bliss' contention that this was not a change in terms and conditions of employment is rejected. The change involved a requirement that employees must act a certain way and perform a certain duty, i.e. wear seat belts, while on Fort Bliss, the work premises. Failure to comply made the employees subject to discipline. I conclude such a change is a change in terms and conditions of employment. The FLRA has held that similar changes raise the obligation to bargain about their impact and implementation; thus FLRA held the institution of a magistrate system for parking and traffic violations was the type change to require management to bargain over its impact and implementation. Department of the Air Force, Malstrom Air Force Base, Montana, 2 FLRA 12 (1979) and Philadelphia Naval Shipyard, Department of the Navy, supra.

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[6] This is commonly referred to, and will be so referred to herein, as "impact and implementation" bargaining.

[7] It must be noted that the change was mandated by Department of the Army, 32 CFR 634.4, which requires installations to apply state traffic law and Texas law had at that time a mandatory seat belt provision.

The FLRA dealt with the institution of a mandatory seat belt rule in United States Air Force, Lowry Air Force Base, Denver, Colorado, 22 FLRA 171 (1986), hereinafter called the Lowry Air Force Base Case. The FLRA concluded there had been no violation of the Statute because ". . . the Unions requested negotiations and bargained on all negotiable aspects of the change" Lowry Air Force Base Case, supra at 174.[8] Thus the FLRA did not find this was not the type of change that required bargaining, rather the FLRA found that the respondent therein had met its obligation to negotiate concerning the impact and implementation of the change.

Further Fort Bliss contends that the impact of the implementation of the mandatory seat belt rule is de minimis. The FLRA has stated that ". . . no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimis." Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA 922 (1984) at 924. In Department of Health and Human Services, Social Security Administration, Chicago Region, 19 FLRA 827 (1985) the FLRA set out a not all inclusive list of 5 criteria for determining if the impact of a change is more than de minimis. In the subject case I note the change applies and affects all members of the bargaining unit and it can reasonably foreseeably result in point assessments against the employees, which affects their right to drive on the facility, result in the imposition of monetary fines and result in employees being delayed in reporting to work because of road block seat belt checks. Further it is a hardship on handicapped employees who can not comply with the seat belt requirement. Accordingly, I conclude the impact of the imposition of the mandatory seat belt rule is more than de minimis.

---

[8] The FLRA found that certain specific proposals of the unions were non-negotiable.

Although not urged in its brief Fort Bliss also seems to have raised contentions that the Union waived its right to negotiate concerning the impact and implementation of the change or that, because the change was mandated by Department of the Army, Fort Bliss was not obligated to bargain over the impact and implementation of the change.

Any waiver of a right must be clear and unmistakable. U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, 21 FLRA 484 (1986). Not only did the Union not waive its right to negotiate concerning the impact and implementation of any change in seat belt practices, on the contrary, Bayer specifically advised Fort Bliss representatives in the Spring of 1984 that if they decide to implement a seat belt policy the Union wished to negotiate about it.[9] The Union then received no advance notice of the new policy and learned of it by reading an announcement of it in the Fort Bliss Bulletin on the day the new policy became effective. Even then, when the Union asked to bargain about the impact and implementation of the change Fort bliss refused.

The fact that the change in seat belt policy was mandated by the Department of the Army did not relieve Fort Bliss of its obligation to bargain over the impact and implementation of the change. Defense Logistics Agency, Cameron Station, Virginia, 12 FLRA 412 (1983).

In light of all of the foregoing, I conclude that Fort Bliss did violate Sections 7116(a)(1) and (5) of the Statute by failing and refusing to negotiate in good faith with NAGE Local R14-89 by unilaterally implementing a mandatory seat belt policy at Fort Bliss without prior notice to or bargaining with the Union over procedures to be observed in implementing the proposed change and appropriate arrangements for adversely affected employees.

General Counsel of the FLRA requests a status quo ante remedy. The General Counsel of the FLRA citing Federal Correctional Institution, 8 FLRA 604 (1982) correctly points out that in the subject case the factors the FLRA set out to be considered when considering a status quo ante remedy would justify such a remedy in the subject case. However, the change herein involved basic safety practices to protect employees, that management was required to make. I conclude it would not be an appropriate remedy herein to require Fort Bliss to rescind such a policy.[10]

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[9] This Spring of 1984 meeting did not constitute bargaining over the subject change because it was a year and a half before the change, the subject of the 1984 discussion was a proposed change that was not instituted and was before the State of Texas had a mandatory policy.

In the subject case, I conclude that a remedy would be appropriate that would require Fort Bliss not only to bargain about future changes but would require it, to the extent requested by the Union, to bargain about the implementation of the mandatory seat belt policy and to bargain about arrangements for adversely affected employees.

Having found and concluded that Fort Bliss violated Sections 7116(a)(1) and (5) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that United States Department of Defense, Department of the Army, United States Army Air Defense Center and Fort Bliss, Fort Bliss, Texas shall:

1. Cease and desist from:

    (a) Instituting changes in the policy concerning the wearing of automobile seat belts at Fort Bliss without first notifying and affording National Association of Government Employees, Local R14-89, an exclusive collective bargaining representative of its employees, an opportunity to bargain concerning the procedures to be observed in implementing such changes and appropriate arrangements for employees adversely affected thereby.

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[10] However, a status quo ante remedy is normally the most effective remedy for putting the parties in a position to meaningfully bargain about the impact and implementation of a change.

(b) Failing and refusing, upon request, to bargain with National Association of Government Employees, Local R14-89, an exclusive representative of its employees, concerning the procedures to be used in the implementation of the mandatory automobile seat belt policy on Fort Bliss and over appropriate arrangements for any employees adversely affected by the institution of the mandatory seat belt policy.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Give National Association of Government Employees, Local R14-89, or any other collective bargaining representative of its employees, advance notice of any intention to change seat belt or other driving requirements and, upon request, bargain with National Association of Government Employees, Local R14-89, or any other collective bargaining representative of its employees, concerning the procedures to be observed in instituting such changes and appropriate arrangements for employees adversely affected thereby.

(b) Upon request, bargain with National Association of Government Employees, Local R14-89, concerning the procedures to be observed in the institution of the mandatory automobile seat belt policy at Fort Bliss and concerning appropriate arrangements for employees who were adversely affected by the institution of such a policy.

(c) Post at its Fort Bliss facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: September 29, 1986
Washington, D.C.

[6-CA-60029]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in the policy concerning the wearing of automobile seat belts at Fort Bliss without first notifying and affording National Association of Government Employees, Local R14-89, an exclusive collective bargaining representative of our employees, an opportunity to bargain concerning the procedures to be observed in implementing such changes and appropriate arrangements for employees adversely affected thereby.

WE WILL NOT fail and refuse, upon request, to bargain with National Association of Government Employees, Local R14-89, an exclusive representative of our employees, concerning the procedures to be used in the implementation of the mandatory automobile seat belt policy on Fort Bliss and over appropriate arrangements for any employees adversely affected by the institution of the mandatory seat belt policy.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL give National Association of Government Employees, Local R14-89, or any other collective bargaining representative of our employees, advance notice of any intention to change seat belt or other driving requirements and, upon request, bargain with National Association of Government Employees, Local R14-89, or any other collective bargaining representative of its employees, concerning the procedures to be observed in instituting such changes and appropriate arrangements for employees adversely affected thereby.

WE WILL upon request, bargain with National Association of Government Employees, Local R14-89, concerning the procedures to be observed in the institution of the mandatory automobile seat belt policy at Fort Bliss and concerning appropriate arrangements for employees who were adversely affected by the institution of such a policy.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202 and whose telephone number is: (214) 767-4996.

☆U.S. G.P.O. 1987-181-223:60002

9-3 No. 65

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 65

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

December 30, 1986

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UNFAIR LABOR PRACTICE CASES

Case No. 1-CA-60148 (November 21, 1986)

Social Security Administration (Baltimore, Maryland) and Social Security Administration Boston Region and American Federation of Government Employees, AFL-CIO, Local 1164

Case No. 3-CA-60041 (November 21, 1986)

Department of Commerce, Bureau of Census and Edward Hanlon

Case No. 57-CA-60349 (December 9, 1986)

Department of the Army, U.S. Army Reserve Personnel Center, St. Louis, Missouri and American Federation of Government Employees, Local 900

Case No. 2-CA-60146 (December 24, 1986)

Social Security Administration and Social Security Administration, Northeastern Program Service Center and American Federation of Government Employees, AFL CIO, Local 1760

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y3.F31/21-3:

Case No. 2-CA-50467 (December 30, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO

Case No. 3-CA-30280 (December 30, 1986)

U.S. Department of Army, Headquaraters and DARCOM HQ and National Federation of Federal ELmployees, Local 476

[1-CA-60148]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
(BALTIMORE, MARYLAND) AND SOCIAL
SECURITY ADMINISTRATION BOSTON
REGION

Respondent

and

Case No. 1-CA-60148

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1164

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 8, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

While the General Counsel filed timely exceptions to the Judge's Decision and Order, it subsequently moved to withdraw its exceptions. The Authority grants the General Counsel's motion.

Therefore, since no exceptions are presently before the Authority in this case, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., November 21, 1986.

Harold D. Kessler
Director of Case Management

[1-CA-60148]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

SOCIAL SECURITY
ADMINISTRATION (BALTIMORE,
MARYLAND) AND SOCIAL
SECURITY ADMINISTRATION
BOSTON REGION

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1164

Charging Party

Case No. 1-CA-60148

James R. Collins, Esquire
For the General Counsel

Patricia A. Randle, Esquire
Mr. Robert Chlup
For the Respondent

Mr. Percy O. Daley, Jr.
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to amended charges first filed on February 13, 1986, by Local 1164, American Federation of Government

Employees, AFL-CIO, (hereinafter called the Union or Local 1164), a Complaint and Notice of Hearing was issued on April 8, 1986, by the Regional Director for Region I, Federal Labor Relations Authority, Boston, Massachusetts. The Complaint alleges that the Social Security Administration (Baltimore, Maryland) and Social Security Administration Boston Region, (hereinafter called the Respondent or SSA), violated Sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by failing to comply with an arbitration award, which, pursuant to timely exceptions, was modified by the Federal Labor Relations Authority.

A hearing was held in the captioned matter on May 14, 1986, in Boston, Massachusetts. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein. The General Counsel and the Respondent submitted post-hearing briefs on June 25 and June 30, 1986, respectively, which have been duly considered.[1]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.[2]

Findings of Fact

Ms. Mary Ellen Shea is employed by the Respondent in its Dorchester, Massachusetts Branch Office as a Claims Representative. Ms. Shea is a Vice President of AFGE, Local 1164.

On February 23, 1983, Ms. Shea requested that she be granted on February 28, 1983, official time to perform representational duties at a field office. Her request for official time on February 28, 1983 was denied by the Respondent.

Thereafter, on February 28, 1983, Ms. Shea worked her regular eight hour tour of duty for which she was duly compensated. At the conclusion of such tour of duty she

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[1] In the absence of any objection, Respondent's "Motion to Correct Transcript," should be, and hereby is, granted.

[2] The facts for the most part are not in dispute.

READEX FICHE best copy available

spent approximately two additional hours in non-duty status performing certain representational duties.

Subsequently, the Union filed a grievance over the Respondent's refusal to grant Ms. Shea official time on February 28, 1983, for purposes of performing representational duties. Eventually hearings on the matter were held by Arbitrator Theodore Role on December 7, 1983 and January 17, 1984.

On February 1, 1984, Arbitrator Role issued his decision wherein he found that Respondent had violated the provisions of the collective bargaining agreement in effect by failing to grant Ms. Shea's request for official time on February 28, 1983. As a remedy, Arbitrator Role ordered Respondent, among other things, to make Ms. Shea whole for the two hours of personal time that she had utilized in performance of representational duties on February 28, 1983.

On June 29, 1984, Arbitrator Role clarified his award to provide that Ms. Shea be given two hours of "administrative leave" to make her whole for the personal time she had spent after working hours on February 28, 1983.

On July 26, 1984, the Respondent filed "Exceptions to the Arbitrator's Make Whole Remedy Clarification and Request For A Stay" with the Federal Labor Relations Authority, (hereinafter called the Authority). In support of its exceptions the Respondent contended that the remedy of "two hours of administrative leave" was contrary to law, rule and regulation and that such remedy did not "draw its essence from the collective bargaining agreement" Additionally, Respondent contended that the Arbitrator had exceeded his authority and that the use of personal time was not a condition of employment.

On August 22, 1985, the Authority issued its decision[3] wherein it agreed with Respondent's contention that the Arbitrator's award of two hours of administrative leave was contrary to Government-wide Regulation (FPM). After setting forth the rationale for its decision the Authority amended the Arbitrator's decision to provide that in place of the "two hours of administrative leave" awarded Ms. Shea,

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[3] Local 1164, American Federation of Government Employees, AFL-CIO and Social Security Administration, Boston Region, 19 FLRA No. 110.

Ms. Shea "be compensated at the appropriate straight-time rate for the two hours of nonduty time spent in preparation for the grievance presentation involved." In view of its decision that the Arbitrator's decision was contrary to law, the Authority deemed it unnecessary to deal with Respondent's alternative exceptions.

On August 30, 1985, Respondent petitioned the Authority for reconsideration of its decision. Respondent contended in support of its petition for reconsideration that the Authority's order was contrary to various rulings of the Comptroller General, previous Authority decisions, the legislative history and the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct 439.

On September 26, 1985, the Authority issued its "Order Denying Motion For Reconsideration" concluding, among other things, that Respondent's arguments made in support of its motion "constitute(d) nothing more than disagreement with the Authority's interpretation and application of the Statute and with its decision modifying the arbitrator's award."

On October 30, 1985, Respondent informed Ms. Shea that it could not comply with the "FLRA adjustment to the award of Arbitrator Theodore Role" in that hours worked in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek cannot be compensated at a rate less than one and one half hourly rate." In short, there is no way that management can cause a straight-time payment as the Authority has decided."

Discussion and Conclusions

The General Counsel takes the position that once an arbitrator's decision is final by virtue of the fact that no exceptions thereto were filed or if exceptions were filed, such exceptions were denied by the Authority, the parties have no choice but to comply with the arbitrator's decision. Failure to comply constitutes a violation of Sections 7116(a)(1) and (8) of the Statute. The Respondent does not appear to take issue with the foregoing legal conclusions.

In line with the above legal conclusion, the General Counsel takes the position that the arbitrator's decision in the instant case became final when the Authority modified the remedy in the arbitrator's award and subsequently denied the Respondent's motion for reconsideration on September 26, 1985. In such circumstances, Respondent was under an obligation to comply with the arbitrator's award as modified by the Authority. It's admitted refusal to so comply, according to the General Counsel, was violative of Sections 7116(a)(1) and (8) of the Statute.[4]

The Respondent on the other hand takes the position that the modified arbitrator's award does not become final until it, the Respondent, has had the opportunity to have exceptions thereto ruled upon by an independent legal forum. The Respondent would find that in the scheme of things the undersigned administrative law judge would be the appropriate forum to review the validity of the Authority's modification of the arbitrator's award. Finally, the Respondent would find that the modification is contrary to law, rule, regulation and the collective bargaining agreement.

With the exception of the arguments concerning the Authority's power to modify an arbitrator's award and the finality of such modification, the record establishes that the remaining arguments of the Respondent were presented to the Authority in Respondent's Motion For Reconsideration of August 30, 1985. As noted above, the Authority denied the Motion on September 26, 1985, on the ground that Respondent's arguments "constituted nothing more than a disagreement with the Authority's interpretation and application of the Statute and its decision modifying the arbitrator's decision."

The Respondent in the instant proceeding seeks a de novo review of its arguments which were found by the Authority to be without merit. Additionally it questions the power of the Authority to modify arbitration awards as well as the finality of the Authority's modification of such awards. In essence, the Respondent seeks reversal of the Authority's prior decisions in this matter.

Contrary to the contention of the Respondent, I am without power to question the actions, decisions, rulings and/or interpretations of the Authority. An Administrative

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[4] In reaching this conclusion the General Counsel cites Section 7122(a) of the Statute which provides in pertinent part that "the Authority may take such action . . . concerning the award as it deems necessary." Having deemed modification of the arbitrator's award to be necessary, the General Counsel would find that the Authority's decision in this regard to be final.

Law Judge is a legal forum subordinate to the Authority and as such is bound to follow the rulings, interpretations and decisions of the Authority, irrespective of their validity. The Authority's actions, etc., are only reviewable, in appropriate circumstances, but the U.S. Circuit Courts of Appeals.[5]

Accordingly, in view of the above conclusions, I am constrained to find that the Authority has the power to modify arbitration awards and that its action in modifying the award of Arbitrator Role became final on September 26, 1985, when it denied Respondent's motion for reconsideration. I further find that Respondent's subsequent refusal to comply with the final modified award constituted a violation of Sections 7116(a)(1) and (8) of the Statute.

Having found that Respondent violated the Statute by failing to comply with the modified award of Arbitrator Role, it is hereby recommended that the Authority adopt the following order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, 5 USC Section 7118, it is ordered that the Social Security Administration (Baltimore, Maryland) and Social Security Administration Boston Region shall:

1. Cease and desist from:

   (a) Failing and refusing to fully comply with Arbitrator Theodore Role's June 29, 1984 arbitration award, as modified.

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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[5] Cf. Michigan Army National Guard, Lansing Michigan, 11 FLRA 365, 374; Iowa Beef Packers Inc., 144 NLRB 615, 616, where similar restrictions were imposed upon the Administrative Law Judges by the National Labor Relations Board.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

> (a) Fully comply with Arbitrator Theodore Role's June 29, 1984 arbitration award, as modified, including the payment of two hours straight-time pay to Ms. Mary Ellen Shea.
>
> (b) Post at the Social Security Administration's Boston Regional Office, Boston, Massachusetts, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.
>
> (c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: September 8, 1986
Washington, D.C.

[1-CA-60148]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with Arbitrator Theodore Role's June 29, 1984 arbitration award, as modified.

WE WILL NOT in any like or related manner, interfere with, restrain, or our coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL fully comply with Arbitrator Theodore Role's June 29, 1984 arbitration award, including the payment of two hours straight-time pay to Ms. Mary Ellen Shea.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 10 Causeway Street, Room 1017, Boston, MA 02222-1046 and whose telephone number is: (617) 565-7280.

[3-CA-60041]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

Respondent

and

Case No. 3-CA-60041

EDWARD HANLON

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on September 16, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., November 21, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[3-CA-60041]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

Respondent

and

EDWARD HANLON

Charging Party

. . . .

Case No. 3-CA-60041

C. J. Schmidt, Esq.
Lee Udelsman, Esq.
For the Respondent

David B. Scholl, Esq.
Peter A. Sutton, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 29, 1986, by the Regional Director for the Federal Labor Relations Authority, Washington D.C. Region, a hearing was held before the undersigned on April 1, 1986 at Washington, D.C.

This case arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based on a charge filed on October 22, 1985 by Edward Hanlon, an individual, against Department of Commerce, Bureau of the Census (herein called Respondent).

The Complaint alleged, in substance, that by letters dated September 17 and October 8, 1985, Hanlon requested that Respondent permit him to post notices of union meetings and copies of a union newsletter on Respondent's bulletin boards; and that by letter dated October 9, 1985, Respondent refused such request - all in violation of Section 7116(a)(1) of the Statute.

Respondent filed its Answer on February 24, 1986 in which it denied the commission of an alleged unfair labor practice.

Both parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as and cross-examine witnesses. Thereafter, briefs[1] were filed which have been duly considered.[2]

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

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[1] Along with its brief Respondent filed a Motion to Correct the Transcript. No objections having been interposed thereto, and it appearing that such proposed corrections are proper, the motion is granted as requested.

[2] General Counsel filed with the undersigned a Motion to Strike Portions of Respondent's Post-Hearing Brief. The motion is based on the contention that said brief contains assertions of fact, designated in the motion by 2(a) thru (j), as not supported by the record. In respect to 2(a) of the motion, the undersigned agrees that the transcript does not support the factual assertion that Hanlon, on behalf of "Members of Local 2782 for NTEU made requests to use space to erect tripods, agency mail system and photocopying services. Thus, that portion of the Respondent's brief on page 3 which states: "including the right to use space to erect tripods, agency mail system and photocopying services" shall be stricken therefrom. The undersigned deems all other alleged assertions of fact as either supported expressly or impliedly, argumentative in nature, or interpretive conclusions of the collective bargaining agreement and the testimonies adduced at the hearing. Accordingly, I deny the motion with respect to all other portions of the brief, as contended by General Counsel.

Findings of Fact

1. At all times material herein American Federation of Government Employees, Local 2782, AFL-CIO (herein called AFGE) has been the collective bargaining representative of all Respondent's employees who are employed at the Suitland Federal Center in the Washington, D.C. metropolitan area excluding management officials, supervisors, employees engaged in personnel work in other than a purely clerical capacity, confidential employees, and temporaries of 90 days or less where there is no expectation of continued employment. About 3,000 employees comprise the bargaining unit.

2. Both AFGE and Respondent are parties to a written collective bargaining agreement covering the aforesaid unit. The said agreement became effective by its terms on April 25, 1985 and remains in effect for three years thereafter.

3. Article 14 of the agreement, Entitled "Facilities and Services," provide under Section 14.1 as follows:

> BULLETIN BOARDS
>
> (a) The Union will be provided 20 bulletin boards of approximately the same size with receptacles for distribution and receipt of communications with unit employees. The Union agrees to maintain the boards in a neat manner and will be solely responsible for the content of all posted material and for assuring that no such material contains assertions for which prior inquiry could have suggested no reasonable basis in truth. The Employer will be provided a copy of any material posting on the Union's bulletin boards, at least simultaneously.

4. Chapter K-15 of the Census Bureau's Administrative Manual sets forth, in Sections 1 through 5, Respondent's policy re the use of bulletin boards, the procedure for posting material, and the typos of material which may and may not be posted on such boards. (G.C. Exhibit 3). Approval is required by specified officials for posting material on bulletin boards maintained by Census division and offices, Personnel Division and GSA.

5. (a) Illustrations of the types of material which may be posted, as set forth in Section 5.01 of the Administrative Manual, are as follows:

(1) Civil Service circulars and announcements

(2) Bulletins re payroll deductions for savings Bonds, combined charities programs, and similar activities.

(3) Employee group meeting announcements, or other notices of interest to employees.

(4) Performance rating system notices.

(5) Employee health benefit program information.

(6) Credit Union information.

(7) Safety program posters.

5. (b) Illustrations of the types of material, as set forth in Section 5.02 of the Administrative Manual, which may not be posted, are as follows:

(1) Material which may be a source of criticism or embarrassment to Census on Department of Commerce in its official activities or relationships.

(2) Commercial advertisements.

(3) Material not pertinent or applicable to Department employees.

(4) Material of a political, sectarian, discriminatory, or objectionable nature.

6. There are three types of bulletin boards at the Suitland Federal Center: agency-wide, division-wide and Union bulletin boards.

7. The agency bulletin board is set aside for agency-wide informations which management feels should go to all employees. These bulletin boards are located in a central area designated as the "Sunny Spot," and they are monitored by the personnel office. Except for agency recognized groups, approval is required by the Chief of

Employee Services for posting material by anyone on those boards. Approval has been granted in the past for the posting of notices on the agency bulletin boards relating to retirement luncheons or parties for retiring employees; funerals of employees; bowling league announcements; seminar of a professional society (Society of Government Economists) missing child; soliciting contributions for employees on their family in need of medical treatment; professional sporting events; the sale of items by individual employees.

8. The Department of Commerce's Administrative Order 202-707, to which Respondent abides, defines voluntary employee organizations as "an association of employees who join together for various purposes, to meet their collective needs and interests, to serve their common welfare and to make their relationships and employment more satisfying." The Order specifies that a labor organization is not included in this group. Typical of such voluntary employee organizations, which are recognized and granted the privilege of posting notices on bulletin boards, are the following:

Association of supervisors
Credit unions
Welfare or emergency loan funds
Professional societies
Educational or training and development groups
Food service organizations
Recreation associations
Voluntary youth associations
Civil rights associations

9. Within Respondent agency are 30 divisions. Each one has a bulletin board on which are posted, in addition to agency-wide information, items of interest to the particular division. Kathleen M. Hurrle, Chief of Employee Services and Performance, Management Branch in Personnel Division, testified that division boards would post information re such things as the code of ethics; how to contact the IG for waste, fraud or abuse; information on Workmen's Compensation or Employee Counseling; alcohol problems; letters written by retirees or an employee who has had a baby.

10. Hanlon testified, and I find, that various posters and notices appeared on agency-wide bulletin boards in the past -- some of which are still posted - concerning matters other than those which are generally permitted by Respondent. These included items involving: bingo games; church

activities; political announcements; ads for records and cassettes; "Kung Fu" Combat instruction; National Association of Blacks Within Government; amusement park announcement; "Saving Spree" coupon books; sympathy cards; music fairs notice; slide show of an employee's trip to Europe; commercial ad by Marriot hotel; Christmas party; Census computer club notice and computer firm's products; message for graduates of Suitland High School.

11. Both Hanlon and employee Morris Murray testified, and I find, that the 30 divisions bulletin boards have been used in the past for posting of various types of notices including: Christmas party announcement, athletic games; proms; contests; cartoons; retirement parties; church announcements; candy sales; commercial forms' flyers; music contests; sales of items.

12. The record reflects that the notices posted on agency and division bulletin boards, as aforesaid, have been customarily posted during the past 10 - 15 years; that some notices remained for a few months while others announcing an event in the immediate future were only posted for a short time.

13. Chief Hurrle testified she did not approve for posting on agency boards the items in G.C. Exhibit 6; that they are not the types of materials which should be posted.3/ With respect to the division bulletin boards, which are controlled by the division chiefs, Hurrle testified she took down notices from a division board concerning anti-semitic remarks, political announcements and personal sale notice. She has also removed union material from bulletin boards, as well as objectionable material from agency boards (anti-semitic and political items).

14. Record facts show there are two bulletin boards in the Population Division. One is straight across from the office door of the administrative office. The other board is about eight feet to the left of said door. Hanlon testified that the division chief and his assistant, as well as the administrative office, must pass the bulletin boards

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3/ It was stipulated that two posters, which were put up on the agency bulletin board, were: "Nutrasweet World Professional Skating Championship" and "Budweiser Temptation Concert." It does not appear that management disapproved their postings.

to speak to any division employees. Further, he testified to having seen administrative officers in the Population Division, Computer Sources Division and Housing Division post notices on agency bulletin boards. Murray testified to having talked to the branch chief of the Agriculture Division regarding the accuracy of certain information in the notices which were posted.

15. In a memorandum dated September 17, 1985 employee Hanlon wrote Colleen Woodward, Chief of the Labor Relations Staff of Respondent, requesting permission to post certain material on agency bulletin boards. Hanlon requested, as an individual employee, the right to post notices of meetings of "Local 2782 member for NTEU," as well as notices of the time and place of film showings (previously approved) about NTEU. Further, the employee asked permission to post on each Agency bulletin board a copy of the newsletter, "The NTEU Alternative," favoring re-affiliation with NTEU.[4]

16. Attached to the request by Hanlon, as set forth above, were two different samples of notices which he requested to post. They were as follows:

FILM SHOWING[5]

THIS IS NTEU

Time: 12 Noon on . . . . .
Place: G - 271 FOB #3

FREE BUFFET LUNCHEON
(COLD CUTS, POTATO SALAD, ICED TEA
DESSERT)

SPONSORED BY: LOCAL 2782 MEMBERS
FOR NTEU

Pursuant to 5 USC 7102

. . . . . .

---

[4] The memorandum also recited that the request was made "as employees;" that it was not made by or for, or as agent of, any union; that the request was made under 5 U.S.C. 7102 and Agency regulations.

[5] Respondent had granted permission to show the NTEU films in training classrooms in September and October.

MEETING:

"LOCAL 2782 MEMBERS
FOR NTEU"

Time: 12 Noon on . . . . .
Place: G - 271 FOB #3

FREE BUFFET LUNCHEON

(Tacos, Chili, Salad
and Dessert

EVERYONE WELCOME

COME AND HEAR YOUR FELLOW
EMPLOYEES DISCUSS THE
UNION ISSUES FACING US

Pursuant to 5 USC 7102

17. Woodward replied to Hanlon's request in a memorandum dated October 9, 1985. In respect to his desire to use agency bulletin boards to post NTEU related literature, Woodward stated that bulletin boards fall into the category of agency facilities like house mail or reproduction facilities; that generally the types of notices being posted on the bulletin boards, to which Hanlon referred, are agency-sponsored or employee organization-sponsored activities or notices about activities pertinent to employees in a given division. She indicated that CAM Chapter K-15 applied to employee groups and unions; that if it applied to individuals, Section 5.02 prohibits posting of his material as inappropriate. Woodward further informed Hanlon that approval to post the items on agency boards gives the reasonable impression that the agency supports those seeking reaffiliation regardless of contrary disclaimers.[6]

18. At the hearing Woodward testified that without an "open-window period"[7] no union would be permitted to post

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[6] In her memorandum Woodward also referred to an alternative means of communication, i.e. distribution of "NTEU Alternative" at approved sites, and the case of 19 union bulletin boards provided for AFGE for union related matters.

[7] The witness explained that this term, as she understood it, referred to a period during which several unions may come foward to request the Authority to monitor an Election for a union to represent the unit employees.

anything on the agency bulletin boards. The bulletin boards, other than the 19 boards which are set aside for AFGE, are for any matters except union material. All union related items, regardless of which union desired to post them, could not be posted on agency boards but must be posted on the 19 union bulletin boards. This restriction would include notices which the incumbent union wanted to post that did not relate to union meetings or membership. Thus a notice re a baseball game or other events sponsored or held by the unions must be posted on the union bulletin boards.

Conclusions

The issue for determination herein is whether, under the circumstances, Respondent was entitled to refuse an employee's request to post, on the agency's bulletin boards, notices relating to a union (other than the incumbent union) in view of its past practice in respect to permitting the posting thereon of personal and non-work related items.

General Counsel contends that a past practice has existed for many years whereby Respondent has permitted employees to post personal and non-work related material on agency and division bulletin boards. Having approved the posting of such material, the employer's refusal to allow Hanlon to post NTEU notices is allegedly disparate treatment in violation of Section 7116(a)(1) of the Statute. It is further argued that though Respondent has set aside union bulletin boards for posting material by American Federation of Government Employees, Local 2782, AFL-CIO, - the bargaining representative - it does not legitimize the ban on posting NTEU material on agency boards.

In denying that it has run afoul of the Statute by refusing Hanlon's request to post NTEU material, Respondent makes several assertions. It insists that the agency never established a practice of allowing individuals to post notices on its bulletin boards. Material posted on the agency boards is either management information or information from agency-sponsored groups, and all material must be posted in accordance with Census Administrative Manual, Chapter K-15. In respect to division boards, it is contended that only division employees may use them for posting matters of interest to a particular division. Respondent also argues that the bargaining representative, by its contractual arrangement for the use of union bulletin boards, waived employees' use of bulletin boards - a use which is not a statutory right and hence is subject to waiver. Finally, it is urged that since NTEU does not have equivalent status with AFGE Local 2782, the incumbent union, Respondent could not have permitted its postings without rendering assistance to NTEU in contravention of 7116(a)(3).

Since the right of employees under Section 7102 of the Statute "to form, join, or assist any labor organization . . . freely . . ." parallels a similar right granted to employees in the private sector under Section 7 of the National Labor Relations Act, as amended, consideration should be given to the case law established in that sector.

It was made clear by the National Labor Relations Board that the use of company facilities, i.e. bulletin boards, was not a statutory right of either a union or employees. Container Corporation of America, 244 NLRB 318. However, when an employer permitted its employees to utilize its bulletin boards for posting items of a personal nature (social affairs, religious meetings, sales of personal property, cards, advertisements, or cartoons), the Board concluded it could not validly discriminate against notices of union meetings posted by employees. Honeywell, Inc. 262 NLRB 1402; Arkansas-Best Freight System, Inc., 257 NLRB 420; Midwest Stock Exchange, 244 NLRB 1108. Maintaining and enforcing a rule prohibiting such posting of union material was deemed a denial of such Section 7 rights, and the Board found such conduct by the employer to be violative of Section 8(a)(1) of that Act. Note is also taken of the fact that in the Honeywell case, supra, separate bulletin boards were set aside for the company, employees and the incumbent union.[8] A prohibition by the employer of notices posted by an employee relating to a meeting of another labor organization was held to constitute an unfair labor practice. The Board's decision rested on the past practice of the company which permitted the posting of various types of personal notices by its employees on its bulletin boards. Therefore, it was concluded, the employer could not validly discriminate against notices of union meetings.

In the public sector the Authority has given cognizance to the ruling that neither a union nor an employee has a statutory right of access to agency bulletin boards.

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[8] "Union" Bulletin boards were established pursuant to a collective bargaining agreement with the union representing the company's production and maintenance employees.

Permission to post material may be subject to restrictions o limitations. See Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, 13 FLRA 239. However, where a past practice has been followed whereby a union and individuals were permitted to post material on bulletin boards, the right of access may not be abridged by the employer by his removing union notices. Such removal and prohibition re future posting of such notices is deemed interference under 7116(a)(1) of the Statute. Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims, 11 FLRA 77.[9] To the same effect, the Authority concluded that posting a notice, relating to a rival union, on a locker by an employee who was an officer of said unions was a right which could not be abridged by the employer. It was noted that a past practice existed whereby Respondent allowed employees to post notices of all kinds in the teacher's lounge. Department of Defense, Dependent Schools, Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA 849.

In the case at bar Respondent takes the position that only recognized groups or associations were permitted to pos notices on the agency bulletin boards. It insists that just management sponsored material is posted on the bulletin boards; that individuals may post items in limited circumstances upon approval from management, but individuals are not permitted to use the bulletin boards. In this respect Respondent adverts to Census Administrative Manual K-15, Sections 5.01 and 5.02 which delineate items that may or may not be posted. It thus disagrees with any suggestion that a past practice existed whereby employees were permitted to post personal and non-work material on the agency's bulletin boards.

It is well established in the public sector that, in order to conclude a past practice existed in respect to employment conditions, it must be shown that such practice was consistently exercised for an extended period of time. Further, the practice must have been followed by the parties or not challenged. Moreover, while knowledge by management and consent to the practice are factors in determining whether a practice had existed, they may be inferred from facts reflecting that the practice was "open and notorious" for a considerable length of time. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 19 FLRA 1085; Department of Health and Human Services, Social Security Administration, 17 FLRA 126.

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[9] Cf. Federal Election Commission, 20 FLRA 20, where there was no evidence of an agreement or a past practice giving rise to or right of employees or the union to post notices in hallways of Respondent's facility. Hence the removal of a union poster by Respondent was not violativ of 7116(a)(1).

The record herein reflects that during a 10 to 5 year period various items of a personal and non-work nature were posted on agency bulletin boards. Those notices, which remained thereon for months at a time, concerned such projects as; Xmas parties, contests, cartoons, athletic events, sympathy cards, sales of articles, social events, thank you cards, correspondence. While it does not appear that management gave express approval to all such postings, or that Respondent's labor relations personnel posted the aforesaid material, various supervisory officials observed the items on the bulletin boards and even commented about them. Although some notices were removed by Hurrle, which were deemed offensive (anti-semitic or political material), the bulk of personal and non-work items - many of which were not sponsored by recognized or approved organizations - were allowed to remain on the bulletin boards. Moreover, there is no evidence to sustain a finding that wide-spread disapproval by management re posting of personal items had been made known to employees by Respondent. Hence, I agree with General Counsel that a past practice has been established whereby such personal and non-work material was posted by employees, with management's approval and acquiescence, upon the agency's bulletin boards.

Since it is concluded that a past practice of permitting the posting of personal and non-work materials existed and contained at the Suitland Federal Center, a denial by Respondent of such permissions to Hanlon for the posting of union notices (non-work items) on the agency bulletin boards could well be discriminatory unless other considerations require a contrary conclusion. While General Counsel insists that refusal to permit NTEU notices constitutes discrimination per se based on a rejection of union material and accepting all other types of notices, attention must be given to the circumstances surrounding the prohibition of the material concerning NTEU at a time when AFGE was the recognized bargaining representative.

In her memorandum of October 9, 1985, Respondent's Labor Relations Officer, Colleen Woodward, advised Hanlon that if management granted his request to post the material concerning NTEU, it could create the impression that the agency supported those seeking reaffiliation. Respondent therefore raised the issue as to whether its approval to post said material on agency bulletin boards would violate the Statute, and, if so, whether the agency was justified in denying the request to post the said material.

An agency will, under Section 7116(a)(3) of the Statute, commit an unfair labor practice if it engages in certain conduct which does favor a union. Thus, it is provided under that Section it will be an unfair labor practice for an agency --

> "to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent Status." (underscoring supplied).

The term "equivalent status," in connection with rendering assistance to a union was confronted earlier under Executive Order 11491, as amended. Section 19(a)(3) of the Order, while not containing the exact language set forth in 7116(a)(3) of the Statute, did provide as follows:

> "(a) Agency management shall not
>
> (3) Sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine service and facilities under Section 23 of this Order when consistent with the best interests of the agency, and its employees, and when the services are furnished, if requested, on an impartial basis to organizations having equivalent status" (underscoring supplied)

Several cases arose under the aforesaid Order which dealt with the obligation of an agency when two unions did not have equivalent status with the employer. In Commissary, Fort Meade, Department of the Army, A/SLMR 793, the Activity had recognized NFFE Local 1651, with whom it had a collective bargaining agreement covering all non-supervisory employees. At a time when the contract was in effect, management permitted an individual, who was an AFGE member but no employee by the Commissary, to solicit membership on behalf of AFGE. Since no representation petition had been filed by AFGE, it was concluded that AFGE was not in equivalent status with NFFE. Thus, it was held that the Activity violated 19(a)(1) and (3) of the Order by granting the individual the right to solicit for AFGE at a time when no representation petition had been filed by that union. The same conclusion was reached in *Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts*, A/SLMR No. 263, where management granted a *request by AFGE* to conduct an organizational campaign on the premises at a time when NAGE, Local R1-39 was the bargaining representative of its Employees. It was held that since no question had been raised concerning representation, and AFGE clearly did not have equivalent status, the Activity could not provide AFGE with services or the use of its facilities. Having done so, the Activity violated 19(a)(3) of the Order. The Assistant Secretary, in said decision, commented that a contrary result would grant management the power to pick and choose a rival organization. Moreover, the stability of labor relations could be jeopardized by an agency using its leverage to permit another union on its premises to campaign.[10/]

Note is taken by the undersigned of the decision by the Assistant Secretary in *Defense Supply Agency, Defense Contract Administration Service, et al.* A/SLMR No. 247. In the cited case management granted a request by a national representative of AFGE to conduct a membership drive at a time when a representation hearing had just terminated involving NFFE, Local 1, which had filed a petition for representation. Inasmuch as AFGE had not intervened, nor cross-petitioned for the employees, it was concluded that union did not have equivalent status and the Activity violated 19(a)(3) by permitting AFGE to use its facilities. The following language of the Assistant Secretary appeared in the decision:

> "My finding herein is based upon the fact that the solicitation *privileges*

[10/] In both the *Commissary, Fort Meade and Natick Laboratories* cases, *supra*, it was also stated that special circumstances could justify a departure from this principle. Thus, if it could be shown that the employees involved are inaccessible to reasonable efforts by an outside labor organization to communicate with them, services might be furnished to said union without violating the Order.

> *were requested by a national representative of the AFGE and were granted by the Respondent to the labor organization as distinguished from solicitation by an individual employee or employees of the Respondent* . . . *employees have the right to solicit* on their non-work time and to distribute campaign material . . . *even when a question concerning representation is pending*." (underscoring supplied.)

A careful review of the cases in the public sector convinces the undersigned that no merit attaches to the defense herein that, inasmuch as NTEU does not enjoy equivalent status with AFGE, Respondent was entitled to refuse the posting of NTEU material by its employer. The underlying theory of this defense is that to permit said posting would indicate that Respondent favors NTEU so as to constitute assistance to said union in violation of Section 7116(a)(3) of the Statute.

It is noted, however, that case law supports the conclusion that the term "equivalent status" has applicability where management grants a right of access to its facilities, including posting, to a *union* other than the incumbent or bargaining representative. The term has no application where an *employee* of an agency is granted permission to solicit or post material on behalf of another union. Thus, in the *Commissary* case, *supra*, the Activity allowed an AFGE member, *who was not an employee*, to solicit on behalf of AFGE despite the fact that the NFFE local was the bargaining representative of the Activity's employees. The absence of equivalent status was significant in determining that management should not have allowed such solicitation which was done by an individual representative of AFGE who was not employed by the Activity. Similarly, in both the *Natick Laboratories* and *Defense Contract Administration* cases, *supra*, management granted requests by outside *unions* to conduct membership drives. Further, in the latter case the Assistant Secretary specified that his finding of an improper grant was based on the fact that the *solicitation privileges were granted to a labor organization rather than an employee of this Activity*. He concluded that *employees have the right to solicit and distribute campaign* material even where a question concerning representation is pending.

Turning to the case at bar, the request to post the notices re an NTEU film and NTEU meeting on the agency bulletin boards was made by an employee of Respondent. It was not made by NTEU as a rival union seeking to file a representation petition or conduct an organizational campaign. The fact that Hanlon was seeking to disseminate information on behalf of, or encourage membership in, NTEU does not detract from the fact that he was taking such actions as an employee. Thus, the question of equivalent status, as set forth in 7116(a)(3) of the Statute, is neither in point nor controlling herein. In view of the past practice whereby Respondent granted permission to many employees to post personal notices on its bulletin boards, a refusal to allow employee Hanlon to post material thereat involving a union (NTEU) was disparate treatment, and it constituted discrimination under Section 7116(a)(1) of the Statute. In the recent case of Department of Defense Dependents Schools, Mediterranean Region, Naples American High School, supra, the Authority found such disparity to be a violation when management refused to allow an employee to post in the teacher's lounge certain union literature, which concerned Overseas Educational Association (OEA) and NTEU, at a time when the Overseas Federation of Teachers (OFT) was the exclusive representative of its employees. The Authority, in agreement with Administrative Law Judge Nash, rejected management's defense that if it permitted re all of its facilities for OEA materials, a valid unfair labor practice charge could have been filed against it.[11]

Accordingly, I conclude employee Hanlon was entitled to use the agency's bulletin boards to post the materials concerning NTEU's film and meetings; that the refund by Respondent to permit him to do so, in light of the past practice permitting employees to post personal and non-work items therein, was discriminatory and violative of Section 7116(a)(1) of the Statute. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section

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[11] The undersigned rejects Respondent's contention that the right of employees to form, join or assist another labor organization was waived by the bargaining representative (AFGE). See NLRB v. Management Company 415 U.S. 322.

7118 of the Statute, the Authority hereby orders that the Department of Commerce, Bureau of the Census shall:

1. Cease and desist from:

    (a) Interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7102 of the Statute, by refusing the request of employee Edward Hanlon, or any other employee, to post union literature on the agency bulletin boards during non-work time.

    (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

    (a) Upon request, permit employee Edward Hanlon, or any other employee, to post union literature on agency bulletin boards during non-work time.

    (b) Post at its facilities at the Suitland Federal Center; Washington, D.C. copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

    (c) Notify the Regional Director, Region III, in writing within 30

days from the date of this Order,
as to what steps have been taken
to comply herewith.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: September 16, 1986
Washington, D.C.

[3-CA-60041]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by Section 7102 of the Statute by refusing a request by Edward Hanlon, or any other employee, to post union literature on agency bulletin boards during non-work time.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7102 of the Statute.

WE WILL, upon request, permit employee Edward Hanlon, or any other employee, to post union literature on agency bulletin boards during non-work time.

____
(Agency or Activity)

Dated: __________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, DC 20033-0758 and whose telephone number is: (202) 653-8452.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
U.S. ARMY RESERVE PERSONNEL
CENTER, ST. LOUIS, MISSOURI

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 900

Charging Party

Case No. 57-CA-60349

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on October 31, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., December 9, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[57-CA-60349]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE ARMY
U.S. ARMY RESERVE PERSONNEL
CENTER, ST. LOUIS, MISSOURI

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 900

Charging Party

Case No.: 57-CA-60349

Alix R. Kettleson, Esquire
For the Respondent

Ms. Francille Powell
For the Charging Party

John F. Gallagher, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Five, Federal Labor Relations Authority, Chicago, Illinois against the Department of the Army, U.S. Army Reserve Personnel Center, St. Louis, Missouri (Respondent), based on a charge filed by the American Federation of Government Employees, Local 900 (Charging Party or Union). The amended complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), on or about March 1986 by changing a past practice in regard to Union officials' use of the telephone in Accessioning Branch II without having given advance notice to the Union and without having afforded the Union an opportunity to bargain concerning the substance and/or impact and implementation of the change.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, the charge, and that in the recent past it had permitted Union officials in Accessioning Branch II to make telephone calls in their work area concerning Union representation. Respondent also admitted that the telephone policy was changed in March 1986. Respondent denied any violation of the Statute.

A hearing was held in St. Louis, Missouri. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. At all times material, Respondent has operated and supervised a facility in St Louis, Missouri known as the U.S. Army Reserve Personnel Center (the Activity).

2. At all times material, the Union has been the exclusive representative of an appropriate unit of employees of the Activity.

3. Accessioning Branch II (ABII) is a work area at the Activity which consists of 17 bargaining unit employees. ABII has only one telephone line. There are two telephones on this line, one located on the supervisor's desk and one on a clerk's desk. The line is for the use of the supervisor, recon clerks, and lead clerks.

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[1] The General Counsel's unopposed motion to correct the transcript is granted except that Respondent's Exhibits 3, 4c, and 4d, which were rejected at the hearing, are placed in the Rejected Exhibits File.

4. In the past employees received and made personal (non-work related) telephone calls on the work section telephone. No distinction was made between Union-related and other non-work related calls. Betty Bowman became branch chief in October 1983, and from that time began receiving complaints, both from within and outside the branch, concerning the telephone being tied up. Other work sections sometimes sent runners to deliver messages because they could not reach the branch by telephone. Other work-related calls were sometimes not received or delayed. Although Ms. Bowman repeatedly reminded employees of the need to free up the telephone line for official business, no action was taken to prohibit non-work related telephone calls other than to urge employees to cut down on telephone calls and, in 1985, to limit calls to three minutes in length. Longer calls were to be made on telephones outside the work area. Ms. Bowman acknowledged that prior to March 1986 "we had been sort of lenient with the phone. . . ."

5. Beginning in at least 1982 and continuing until March 1986, Union officials who were employed in the ABII received and made calls on the telephones in ABII. The calls concerned Union representational and contract administration matters.[2/] Francille Powell, who is employed in ABII and who at various times throughout the applicable period held the Union positions of steward, acting president, and secretary-treasurer, received or made, on the average, 3 to 4 telephone calls per day which concerned Union representational and contract administration matters. Brenda Johnson, who was a Union steward throughout the applicable period, also received and made telephone calls which concerned Union representational and contract administration matters. During this period these telephone calls included telephone conversations initiated by Respondent's agents including Colonel O'Dell, assistant to the Commander of the Activity, Dave Blake, section branch chief, the office of Lt. Col. Donaldson, Chief of the Accessioning Division, Larry Zerman, Chief, civilian personnel labor-management specialist, Art Hahn, labor-management specialist, Bill Martin, labor-management specialist, and supervisors including Sylvia Martin. Ms. Powell also received telephone calls from the office of the Commander of the Activity.

[2/] The record does not reflect, and no issue is posed concerning, how these officials accounted for their time while engaged in such calls.

6. The Activity and the Union have never negotiated over Union use of telephones in the work areas. Pursuant to the collective bargaining agreement, the Activity supplies the Union with an office, office equipment, and an intra-command telephone line for its use in performing representational functions.

7. Because the Union officials who received or made the telephone calls did so at a telephone either on the supervisor's desk or the clerk's desk located near the supervisor's desk, the ABII supervisor, Betty Bowman, had general knowledge that Powell's conversations concerned Union representational and contract administration matters.3/ Ms. Bowman also requested Ms. Powell to use the telephone for Union representational and contract administration matters on at least two occasions when problems with paint fumes and water arose.

8. In March 1986 Lt. Col. Steven D. Donaldson, Chief of Accessions, directed Ms. Bowman to change the policy regarding personal telephone calls. He took the action because (1) he was unable to contact supervisors when he wanted them due to the telephones being tied up, (2) he had received complaints that official long distance calls could not get through to the branch, and (3) he had received messages from the Seventh Signal Command directing that (a) telephone usage be reduced for fiscal reasons; (b) unauthorized calls be identified and administrative charges imposed for such calls; and (c) the Federal Telecommunications System (FTS) not be used for local calls.

9. Respondent, by Betty Bowman, during a meeting with ABII bargaining unit employees in March 1986, announced the changes in the ABII telephone policy ordered by Lt. Col. Donaldson. The changes, as implemented at the time of the March meeting, were as follows:

> a. Incoming personal telephone calls (calls unrelated to official business) are not put through. A written message is taken and given to the employee, or, in

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3/ Bowman denied that she knew what the personal telephone calls were about. However, she acknowledged that "it's very embarrassing, because the phone is on my desk. Sometimes Francille [Powell] wants privacy. I cannot leave my desk, every time someone uses the phone."

an employee's absence, placed upon the employee's desk.

b. If a non-work related call claims that an emergency exists, the call is put through and the employee may use the work telephone immediately.

c. Union officials are treated the same as everyone else. The policy is applied to all employees uniformly. Union officials are no longer permitted to receive or make telephone calls in the work area concerning Union representational and contract administration matters. Union officials are provided with written telephone messages and are permitted to sign out on official time and return calls from the Union office concerning Union representational and contract administration matters. (The Union office is located two floors below the ABII in the same building. There are two telephone lines in the Union office for its exclusive use. As noted, one line is provided by management pursuant to the collective bargaining agreement.)

10. The Union received no notice prior to the implementation of the change.

11. Since the change, Acting Union president Powell has received approximately one or two calls a day and three or four messages pursuant to the new policy. When she receives a message, she contacts her supervisor for official time in order to go to the Union office on the second floor to return the call. On one or two occasions she had been allowed to make brief calls to schedule or change appointments. The primary impact has been the loss of immediate telephone access by bargaining unit employees to the Acting president and Union steward Johnson and delays encountered in returning calls. On one occasion an employee, who had been granted permission to have a Union representative present at an interview of the employee, telephoned for Ms. Powell. When she was unable to talk to Ms. Powell, the employee left her work area and sought Powell at her work location. Although Powell was able to then represent the employee, the employee had additional disciplinary action taken against her for leaving her work area.

12. There are 26 other stewards at the facility. Ms. Powell became Acting Union president in April 1986 and since then has been allowed approximately 50 percent of her time for Union representational activity in the Union office.

Issues Presented

1. Whether a past practice existed whereby Union officials employed in ABII were permitted to receive and make telephone calls in their work area concerning Union representational and contract administration matters.

2. If so, whether a change in such practice concerns the technology, methods, and means of performing work within the meaning of section 7106(b)(1) of the Statute and was negotiable only at the election of the Agency.

3. If not, whether the duty to bargain in good faith was precluded by Army Seventh Signal Command directives?

4. If not, whether Respondent violated section 7116(a)(1) and (5) of the Statute when it implemented the change without having afforded the Union notice and an opportunity to bargain concerning the substance and/or impact and implementation of the change.

Discussion, Conclusions, and Recommendations

Past Practice

It is well-established that the use of agency facilities and equipment by a union is a privilege and not a right, but that once granted, such privilege becomes, in effect, an established term and condition of employment which may not thereafter be unilaterally changed. *Department of Treasury, Internal Revenue Service, Cleveland, Ohio*, 3 FLRA 656 (1980).

It is clear that a union's use of agency telephones and telephone lines for union representational and contract administration matters concerns a matter directly related to conditions of employment of bargaining unit employees. *Department of Air Force, Flight Test Center, Edwards Air Force Base, California*, 21 FLRA No. 61, 21 FLRA 445, 453 (1986); *American Federation of Government Employees, AFL-CIO, Local 3748*, 11 FLRA 122 (1983).

In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA 229 (1982). Essential factors in this regard are that the practice must be known to management, responsible management must knowingly acquiesce, and such practice must continue for some significant period. Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736 (1980); Department of Health and Human Services, Social Security Administration, 17 FLRA 126 (1985).

The record establishes that Union officials who were employed in ABII received and made calls on the telephones in ABII concerning Union representational and contract administration matters from 1982 to March 1986, an extended period of time. It is also concluded that this practice was known by and knowingly acquiesced in by responsible management officials. Respondent's answer admitted that in the recent past it has permitted Union officials to make calls in their work area concerning Union representation. The record reflects that supervisor Bowman had to have been aware of the calls for a significant period and requested Union representative Powell to make such calls on at least two occasions. Moreover, many of the calls to the Union representative in her work area concerning contract administration were initiated by responsible management officials. Respondent claims that calls initiated from management level employees to the Union representative at the work station meant no more than management used the telephone to conduct its own official business with the Union. I disagree in the circumstances presented here. The Union representative was permitted to receive calls from management level officials at her work station during this period, and there is no indication in the record that calls of this nature can continue to be directly received by the Union representative at her work station following the change. Respondent also points out that the use of the telephones was challenged from time to time by the supervisor's repeatedly reminding employees of the necessity to free up the telephones for business only. However, as found above, the same use of the telephones continued following the reminders, the supervisor acknowledged that she was lenient with the use of the telephones, and no action was taken during the period to change the practice other than to limit all non-work related calls to three minutes. There is no indication that Respondent intended to implement any other specific procedure prior to the change in issue. It is concluded that the

General Counsel established by a preponderance of the evidence that a practice whereby Union officials assigned to ABII were permitted the use of Respondent's telephones for Union representational and contract administration matters ripened into a condition of employment.

Technology, Methods and Means

Respondent claims that it was within its statutory right when it initiated a change in the previous practice without affording the Union an opportunity to bargain because the method of telephone usage concerns the technology, method, and means of performing work under section 7106(b)(1) of the Statute and is negotiable only at the election of the agency.

If the change in practice in the instant case involved the establishment or elimination of a telephone/communications system used by Respondent to perform Government work, Respondent would have been correct. See, e.g., Overseas Education Association, Inc., 22 FLRA No. 34, 22 FLRA 351, 371 (1986). However, since the change involved only the Union's access to an existing telephone line and telephones for Union representational and contract administration matters, it did not concern a matter negotiable solely at the election of the agency. As the General Counsel points out, in Department of the Air Force, 21 FLRA No. 61, 21 FLRA 445, 452 (1986), the Authority reviewed an arbitrator's award which "permitted [the union representative] to use the [agency's] AUTOVON for a reasonable amount of time for the purpose of communicating with the Union's president matters arising under the parties' agreement which affect Activity employees represented by the Union." In its first exception, the agency claimed that the arbitrator's award was contrary to section 7106(b)(1) in that it involved "the technology of performing the work of the Agency." In denying that exception, the Authority clearly established that a union's use of an existing telephone line is a substantively negotiable item. The Authority stated:

> In American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 610 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982), the Authority held that

> a proposal, which would allow the Union access to the Air Force telephone system for purposes of administering the parties' agreement did not involve the technology of performing the work of the agency because it did not determine whether the agency would adopt a particular technology of work, e.g., utilize telephones as opposed to some other communications technology. The Authority found that the proposal merely provided the union access to the system which the agency had selected and was in existence for use in connection with contract administration and other labor-management relations matters. The Authority therefore concluded that the provision did not concern a matter negotiable solely at the election of the agency. Accordingly, for the reasons set forth in Wright-Patterson, the Authority finds that the provision awarded by the Arbitrator in this case, which is materially the same as the pertinent proposal in Wright-Patterson, does not involve the technology of performing the work of the Agency and does not concern a matter negotiable solely at the election of the Agency. The Authority therefore concludes that the Agency has failed to establish that the award is contrary to section 7106(b) of the Statute as alleged.

It is noted that Respondent had a long standing concern about personal telephone calls tying up the telephone line, thereby interfering with the work of the office. However, there is no evidence that Union representational and contract administration telephone calls by the two Union representatives were the source of the problem as opposed to calls of a personal nature by the other fifteen employees. If each of the two Union representatives in the section made four Union-related telephone calls per day of three minutes each, as indicated in the case of Ms. Powell, this would amount to a total of 24 minutes spread over the work day. There is no evidence in the record that anything occurred immediately before March 1986 which further exacerbated the problem or created an exigency requiring immediate implementation.

Army Seventh Signal Command Directives

Respondent contends that because the change constituted compliance with directives issued by a primary national subdivision of the agency, it was not negotiable in substance. This argument is without merit. The messages in question did not direct the specific change which Lt. Col. Donaldson implemented. The messages provided general guidance and recommendations concerning unofficial/unauthorized telephone and FTS calls. (See Finding No. 8). They urged appropriate consultation with servicing personnel and legal offices. Thus, Respondent retained the authority to bargain to the extent consistent with law and regulation. Department of Defense, Department of the Navy, Washington, D.C., 20 FLRA No. 13, 20 FLRA 121 (1985). It is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them to the extent of its discretion. That is, unless such matters are inconsistent with Federal law, including the Statute, or Government-wide rule or regulation or agency regulation for which a compelling need exists, they are within the duty to bargain. American Federation of Government Employees, Local 32, AFL-CIO, 22 FLRA No. 61, 22 FLRA 570, 572 (1986). Respondent failed to allege or sustain the burden of establishing that the messages in question constituted an agency rule or regulation for which a compelling need exists in accordance with the Authority's standards set forth in section 2424.11 of its regulations. Aberdeen Proving Ground, Department of the Army, 21 FLRA No. 100, 21 FLRA 814 (1986).

Duty to Bargain Substance of Change

Respondent contends that the impact or reasonably foreseeable impact of the change in policy was de minimis. Respondent cites U.S. Government Printing Office, 13 FLRA 203 (1983), involving management's decision to reorganize a department, and Federal Aviation Administration, Washington, D.C., 20 FLRA No. 11, 20 FLRA 112 (1985), involving management's decision to remove commercial telephone service, in support of this position. These cases are inapposite as they involved the exercise of a management right under section 7106 of the Statute, rather than a condition of employment which may be substantively bargained. Since the substance of the change was itself negotiable as discussed above, the question is whether the statutory obligation to notify and negotiate with the exclusive representative was fulfilled, not the extent of impact of any unilateral change in conditions of employment upon the unit employees. Department of Health and Human Services, Social Security Administration, 19 FLRA No. 123, 19 FLRA 1085 (1985); Department of Defense, Army and Air Force Exchange Service, 20 FLRA No. 32, 20 FLRA 248, 268 (1985).

Respondent points out that it took steps to minimize the impact of the change by providing for emergency situations, allowing brief calls by a steward, upon request, to schedule or cancel appointments, and allowing the steward to sign out on official time to return or make calls. However, these actions were taken unilaterally and not as a result of collective bargaining as contemplated by the Statute. The record reflects that Respondent made the change in past practice in regard to Union officials' use of the telephone line in ABII without having given advance notice to the Union and without having afforded the Union an opportunity to bargain concerning the substance, impact, and implementation of the change. It is concluded that Respondent's action violated section 7116(a)(1) and (5) of the Statute, as alleged.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the U.S. Army Reserve Personnel Center, St. Louis, Missouri shall:

1. Cease and desist from:

(a) Unilaterally changing a past practice in regard to Union officials' use of the telephone in Accessioning Branch II for Union representational and contract administration matters without notifying the American Federation of Government Employees, Local 900, the exclusive representative of its employees, and affording such representative the opportunity to bargain consonant with law and regulation concerning the substance and impact and implementation of such proposed change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Rescind the change in past practice made in March 1986 in regard to Union officials' use of the telephone in Accessioning Branch II for Union representational and contract administration matters, and restore the past practice which existed prior to such change, whereby such officials were able to use the telephone.

(b) Notify the American Federation of Government Employees, Local 900, the exclusive representative of its employees, of any proposed change in the past practice regarding Union officials' use of the telephone in Accessioning Branch II for Union representational and contract administration matters and, upon request, negotiate concerning the substance and impact and implementation of such proposed change to the extent consonant with law and regulation.

(c) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations notify the Regional Director, Region

Five, Federal Labor Relations Authority, Chicago, Illinois, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 31, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change a past practice in regard to Union officials' use of the telephone in Accessioning Branch II for Union representational and contract administration matters without notifying the American Federation of Government Employees, Local 900, the exclusive representative of our employees, and affording such representative the opportunity to bargain consonant with law and regulation concerning the substance and impact and implementation of such proposed change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the change in past practice made in March 1986 in regard to Union officials' use of the telephone in Accessioning Branch II for Union representational and contract administration matters, and restore the past practice which existed prior to such change, whereby such officials were able to use the telephone.

WE WILL notify the American Federation of Government Employees, Local 900, the exclusive representative of its employees, of any proposed change in the past practice regarding Union officials' use of the telephone in Accessioning Branch II for Union representational and contract administration matters and, upon request, negotiate concerning the substance and impact and implementation of such proposed change to the extent consonant with law and regulation.

____
(Agency or Activity)

Dated: __________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 5, whose address is: 175 W. Jackson Blvd., Suite A-1359, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.

[2-CA-60146]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
AND SOCIAL SECURITY ADMINISTRATION,
NORTHEASTERN PROGRAM SERVICE CENTER

Respondent

Case No. 2-CA-60146

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on October 31, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., December 24, 1986.

Harold D. Kessler
Director of Case Management

[2-CA-60146]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

SOCIAL SECURITY ADMINISTRATION
AND SOCIAL SECURITY ADMINISTRATION,
NORTHEASTERN PROGRAM SERVICE CENTER

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Charging Party

Case No. 2-CA-60146

Irving L. Becker, Esq.
For the Respondent

James Armet
For the Charging Party

Susan M. Roche, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq*.

Upon an unfair labor practice charge filed by the captioned Charging Party (herein referred to as the Union) against the captioned Respondent, the General Counsel of the Authority, by the Regional Director for Region II, issued a

Complaint and Notice of Hearing essentially alleging Respondent eliminated a work shift and created a new shift without first completing bargaining with the Union over the impact and implementation of the change.

A hearing on the Complaint was conducted in New York, New York at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Counsel for Respondent and Counsel for the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various employees in Respondent's Program Service Centers including the Northeastern Program Service Center (herein NPSC) where Local 1760 acts as AFGE's agent in representing employees at that Center. Approximately 70,000 employees are encompassed in the overall collective bargaining unit of which approximately 1600 are employed at NPSC.

In October 1985 unit employees in the NPSC Computer Operations Section (herein the Computer Room) worked on a day shift, evening shift and morning shift on a flex-time basis. The day shift was comprised of ten unit employees including two Computer Operators and ran from 7:00 - 8:00 a.m. to 3:30 - 4:30 p.m. The evening shift was comprised of ten employees including three Computer Operators and ran from 3:00 - 4:00 p.m. to 11:30 p.m. - 12:30 a.m. The morning shift was comprised of seven employees including two Computer Operators and a Computer Operator Trainee and ran from 11:00 p.m. - 12:00 a.m. to 7:30 - 8:30 a.m. On October 9, 1985 Julian Bergman, a Labor-Relations Specialist at NPSC, advised James Armet, Local 1760 Vice President for Administration, that Respondent planned to eliminate Computer Operations on the evening shift. By memorandum to Respondent dated October 18, Armet made a demand "to consult" on the decision to abolish the jobs and "negotiate" the procedures management would observe in implementing the decision and the potential adverse impact on members of the bargaining unit. Armet met with various Computer Room employees and on October 28, submitted to management a proposal that the morning shift be abolished and eliminate two positions rather than abolish the evening shift.[1] After management considered the matter for some time Bergman wrote Armet on January 7, 1986 submitting a revised plan which essentially adopted the Union's suggestion and called for the "elimination" of the entire morning shift which, according to Bergman, would result in essentially two shifts: a day shift beginning as early as 6:00 a.m. and ending by 5:30 p.m. and an evening shift beginning as early as 4:00 p.m. and ending no later than 1:30 a.m.[2] Computer Room employees previously on the morning shift would be reassigned and two Computer Operators were scheduled to begin work at 6:00 a.m. and two were to begin work at 8 a.m. The change also involved the realignment of some existing positions on the expanded day shift and the establishment of one new position on the evening shift.

Armet and Bergman met on January 8 or 9, 1986 to discuss the matter. Bergman and Armet agreed that the senior Peripheral Machine Operator on the evening shift would be retained since she was the senior operator and the other Peripheral Machine Operator on that shift would be transferred to a newly created position (Lead Mail Clerk). The only other concern with the proposed change that Armet expressed was that the Computer Operators on the evening shift have an opportunity to bid for the new Computer Operator positions on the revised day shift. Bergman indicated however that management was opposed to reassigning employees from the evening shift.

The two evening shift Computer Operators (Crawford and West) continued to insist on being given an opportunity to bid for jobs on the day shift and Armet conveyed this to Bergman but Bergman contended the matter was not negotiable since no new vacancies were created simply by changing the starting and quitting times of morning shift employees.

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[1] During this period the parties exchanged proposals for ground rules governing "consultations and/or negotiations." Management's proposals of October 31 indicated that the subject for discussion was "Elimination of Evening Shift for . . . Computer Operators."

[2] The wide time ranges are the result of flex-time application.

Armet indicated the Union wished to submit a proposal for negotiation on the procedure to select people for the day shift. Accordingly, on January 13 Armet sent Respondent the following proposal concerning plans to eliminate the morning shift in the Computer Room:

> "Assignment of employees to less desireable shifts will be on the basis of inverse seniority. Selection of employees to man the 6 a.m. starting time of the day shift will be by seniority and will be offered to the most senior qualified employee in the same job regardless of shift. If the senior employee does not desire to change, the offer will be extended to the next senior employee. The parties agree that seniority will be based on the Service Computation Date (SCD) of the employee."

Bergman responded to Armet on January 15, stating:

> "I received your proposals re: the "selection of employees to man the 6:00 a.m. starting time of the day shift." After reviewing your proposal I find it to be not negotiable. The 6:00 a.m. time represents a change in the starting time of the midnight shift which previously was 12 midnight-1:00 a.m. We are not creating new vacancies for this shift in the computer operator position. You propose to change the staffing of all 3 shifts absent a proposed change by management in the staffing area, or the creation of additional vacancies. Further, your proposal provides that employees will have the right not to accept the assignment, or in other words, you are proposing to realign the staffing of the computer operator position on all 3 shifts by the use of volunteers, and then seniority.
>
> "I am available to meet with you today, tomorrow, or Friday to discuss this matter further. It is our intent to implement the change in the shift hours on Tuesday, January 21, 1986 as I advised you at our last meeting."

By memorandum to management dated January 17 Armet challenged Respondent's rewording the realignment from an "elimination" of the morning shift to a change in the starting time of the morning shift, and renewed the Union's demand to negotiate. Armet's memorandum stated:

> "'A rose by any other name is still a rose.' This old adage aptly describes management's latest attempt to avoid its obligation to negotiate with the union on developing a procedure to determine when employees in the Computer Room will perform duties previously assigned to their position.
>
> "Throughout our entire discussions on management's plans to reduce the number of shifts in the Computer Room, Mr. Bergman has repeatedly referenced the 'elimination' of a shift--first the evening and then the morning one. Your attention is directed to Mr. Bergman's January 7th, memorandum (entitled 'Computer Room -- Re: Elimination of Shift') which clearly states: '(i) line with your comments we are submitting the revised plan which provides for the elimination of the morning shift.' Mr. Bergman then continues: '(i)t is our position that the GS-8 Computer Operator on the morning shift (which is being eliminated) will be reassigned to the day shift.' In addition, Mr. Bergman attached an amended schedule which clearly indicated that the morning shift was being eliminated and that there would be two (2) shifts; a day shift and an evening shift.
>
> "So as there is absolutely no confusion about the union's position, the union does not seek to negotiate on the numbers or types of employees assigned to a specific shift or to create new jobs. It seeks only to negotiate 'when employees would perform duties previously assigned to their positions,' a right confirmed by the Federal Labor Relations Authority in (citing FLRA cases).
>
> "The union is more than willing to continue meeting with you and/or your designee regarding this matter but implementation of any change must be delayed pending resolution of this dispute. Should management implement its decision and unilaterally reassign

> employees, the union will proceed to protect its rights and the right of all employees to be treated fairly. Unilateral implementation would, in our opinion, not only be improper but would cause needless upsetment (sic) and disruption to the lives of all employees involved. If it is still your opinion that the union's proposal of January 12th, is still not-negotiable, please provide the appropriate written determination pursuant to Part 2424.3 of the Rules and Regulations of the Federal Labor Relations Authority."

The Union did not seek a negotiability determination from the Authority nor did the parties discuss the matter further.[3] The change was implemented on January 21, 1986 as proposed. The old morning shift was permanently abolished and the seven employees who had been on that shift were affected as follows: a Computer Operator was promoted to foreman; a Computer Operator and a Computer Operator trainee were assigned as Computer Operators starting work at 6:00 a.m.; a Peripheral Equipment Operator (PEO) went to the 4:00 p.m. shift (one evening shift PEO having retired); one employee, an Equipment Operator, retired; and apparently two Clerks joined the flex-time shift beginning at 6:00 a.m. Further, the starting and quitting times of both the day shift and evening shift were moved back one hour. Thus, the shifts before the changes were as follows:

Day Shift

7:00 - 8:00 a.m. to 3:30 - 4:30 p.m.

Evening Shift

3:00 - 4:00 p.m. to 11:30 p.m. - 12:30 a.m.

Morning Shift

11:00 p.m. - 12:00 a.m. to 7:30 - 8:30 a.m.

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[3] The evidence does not indicate that the parties had any established procedure for handling such matters although the record contains some testimony to the effect that some bargaining involving shift changes or the elimination of a shift and seniority rights occurred during the past two years.

The shifts after the changes were as follows:

Day Shift

8:00 - 9:00 a.m. to 4:30 - 5:30 p.m.

Evening Shift

4:00 - 5:00 p.m. to 12:30 a.m. - 1:30 a.m.

New or changed Morning Shift

6:00 - 6:30 a.m. to 2:30 - 3:00 p.m.

In addition to the elimination or change of the morning shift, and transfer of personnel as described above, other positions were realigned including adding a Clerk to the evening shift and establishing a Lead Mail Clerk position on that shift (the individual previously was a PEO on the evening shift, supra).

With regard to the distribution of personnel on the shifts, prior to the elimination of the morning shift the day shift beginning at 7 - 8:00 a.m. was comprised of:

2 - GS-8 Computer Operators
1 - GS-7 Nixdorf Operator
1 - GS-4 Computer Clerk
1 - GS-4 Peripheral Equipment Operator
1 - GS-4 Lead Mail Clerk
4 - GS-3 Mail Clerks/Equipment Operators

After the change work was scheduled as follows:

(A) a shift beginning at 6 - 6:30 a.m. was established with;

2 - GS-8 Computer Operators
1 - GS-4 Computer Clerk or Peripheral Equipment Operator
2 - GS-3 Mail Clerks/Equipment Operators

(B) at 7 - 8:00 a.m., 1 GS-7 Nixdorf Operator

(C) at 7:30 - 8:30 a.m., 1 GS-4 Lead Mail Clerk

(D) at 8 - 9:00 a.m., 2 GS-8 Computer Operators, 1 GS-4 Computer Clerk or Peripheral Equipment Operator, 4 GS-3 Mail Clerks/Equipment Operators.

Prior to the elimination of the morning shift, the evening shift starting at 3 - 4:00 p.m. was comprised of:

3 - GS-8 Computer Operators
1 - GS-7 Nixdorf Operator
1 - GS-4 Computer Clerk
2 - GS-4 Peripheral Equipment Operators
3 - GS-3 Mail Clerk/Equipment Operators

After the morning shift was eliminated, the hours of the evening shift starting at 4 - 5:00 p.m. and was comprised of:

3 - GS-8 Computer Operators
1 - GS-7 Nixdorf Operator
1 - GS-4 Computer Clerk
1 - GS-4 Peripheral Equipment Operator
4 - GS-3 Mail Clerks/Equipment Operators
1 - GS-4 Lead Mail Clerk (a new position)

On February 11, 1986 Computer Operators Crawford and West filed a grievance over the abolishment of the morning shift alleging assigning Computer Operators junior to the grievants to positions on the "more desireable day shift" violated various portions of the collective bargaining agreement. The Union was not a party to the grievance other than providing technical assistance to Crawford and West in drafting the grievance.

Discussion and Conclusions

Counsel for the General Counsel essentially contends that Respondent changed the shift hours of morning shift employees and accordingly was obligated to bargain with the Union on the impact and implementation of that change. Counsel for the General Counsel further urges that the Union's proposal was negotiable and the impact of the change was more than de minimis. Counsel suggests that if the change in hours is construed to be a change in starting and quitting times, then Respondent's obligation would have been to bargain about the substance of the change as well (although not requested by the Union) and the question of de minimis impact would not be considered if a refusal to negotiate was found to exist even as to the impact and implementation of the change.

Respondent contends the Union's proposal of January 13, supra, was not negotiable pursuant to the provisions of sections 7106(a)(1) and 2(A) and (B) of the Statute and section 7106(b)(1) of the Statute.[4] Respondent further contends:5/ that no refusal to bargain was established since the Union failed to request bargaining on the matter after management declared its proposal to be nonnegotiable; that no duty to bargain arose since the Union's proposal far exceeded the scope of the mid-term change in a condition of employment; the changes in conditions of employment were at best *de minimis*; and the unfair labor practice charge herein is barred by application of section 7116(d) of the Statute.6/

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[4] Section 7106 of the Statute provides, in relevant part:

> "(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> > "(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> >
> > "(2) in accordance with applicable laws--
> >
> > > "(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> > >
> > > "(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> . . . . .
>
> "(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> > "(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(footnote continued)

In *Department of the Air Force, Scott Air Force Base, Illinois*, 20 FLRA 857 (1985), the Authority held that a significant change in shift hours is to be construed as the abolishment of a prior tour of duty and the establishment of a new tour, a matter which is negotiable only at the election

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4/ (footnote continued)

> "(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> "(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5/ Respondent raised a number of subsiding contentions which I have considered and found to be without merit when treating the particular issues addressed herein.

6/ Section 7116(d) of the Statute provides:

> "(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedures or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

of the agency under section 7106(b)(1) of the Statute. However, the agency is nevertheless obligated to bargain with the exclusive representative with regard to the impact and implementation of the change.

In the case herein the morning shift was changed by about seven hours, certainly a "significant" change of hours. Accordingly, I conclude the change of hours was tantamount to the abolishment of the prior tour and establishment of a new tour. Scott Air Force Base, supra. Respondent therefore was obligated to bargain with the Union on the impact and implementation of the change.

The change in duty hours of employees on the morning shift was accompanied by a one hour change in the shift hours of the two remaining shifts. The Union was obviously not opposed to the change of hours of four employees or the movement of one employee from the morning shift to the evening shift or the other realignment of employees and hours. Discussions between management and the Union seemed to produce an amicable transition except that two Computer Operators on the evening shift wished to have the opportunity to bid on the morning shift now to begin at 6:00 a.m. Thus the Union submitted its January 13 proposal, supra, which Respondent declared to be not negotiable.

In my view the Union's proposal concerned the procedures which management would observe when abolishing the morning shift and establishing the new shift and the attendent realignment related thereto and I reject Respondent's contentions that the Union's proposal would interfer with management's rights under section 7106(a) of the Statute. I further conclude that the Union's proposal, which obviously was to apply only to Computer Room employees during this particular realignment of shift hours, was negotiable under section 7106(b)(2) and (3) of the Statute. See American Federation of Government Employees, Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 15 FLRA 545 (1984) and cf. Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California, 9 FLRA 703 (1982). No evidence has been presented which would indicate that management had any question concerning the qualifications or capabilities of employees to perform the specific Computer Room jobs regardless of shift assignment. Indeed it would appear from the manner in which this case was litigated and the actual language of the Union's proposal that the proposal merely desired to establish a procedure to be used when management filled the positions on the new shift with employees determined by management to be qualified to perform the work. *Department of Health and Human Services, Social Security Administration*, *supra*.

I also reject Respondent's contention that the Union failed to request bargaining on the matter after management declared its proposal to be nonnegotiable and therefore a finding of violation of the Statute is precluded. In fact, the Union by its letter of January 17, 1986, *supra*, did demand to negotiate on the matter while challenging Respondent's determination that its proposal was nonnegotiable. However, management did not respond to this demand and implemented the shift change on January 21. Respondent cites *Social Security Administration, Baltimore, Maryland*, 20 FLRA 768 (1985) to support its position. In that case the Union and the agency met on Friday, March 4, 1983 and discussed various union proposals relative to a reorganization which was to occur on March 7. During the March 4 meeting the Union did not challenge the agency's contention that various union proposals involved prohibited or permissive subjects of bargaining or seek to further clarify the agency's position on these matters and indeed, subsequent conduct by the union implied union acquiescence of the agency's contention. Such is not the case herein as a reading of the Union's January 17 letter, *supra*, clearly indicates. Thus, I conclude that when Respondent refused to bargain on the Union's proposal found herein to be bargainable, an unfair labor practice occurred and I know of no requirement that the Union is somehow obligated to make additional requests to negotiate in order to have an unfair labor practice established under the Statute. Rather, it is reasonable to assume on the facts of this case that such additional requests would have been futile.

Nor do I find merit in Respondent's argument that the Union's proposal far exceeded that scope of the mid-term change in a condition of employment thereby failing to raise an obligation to bargain by Respondent. In my view the totality of Respondent's actions, which it initiated in eliminating the morning shift, establishing the shift beginning at 6:00 a.m., transferring employees to the new shift, transferring one employee to the evening shift and changing the shift hours of the existing day and evening shifts affected the working hours of all Computer Room employees and gave rise to an obligation for Respondent to negotiate on the Union's proposal.

I also reject Respondent's contention that the impact of the changes herein were *de minimis* and the Complaint therefore should be dismissed. The Authority has held that the statutory duty to negotiate arises if a change results in an immediate impact or a reasonably foreseeable impact on unit employees. *U.S. Government Printing Office*, 13 FLRA 203 (1983). However, the Authority limited the obligation to bargain in these circumstances by subsequently holding that "no duty to bargain arises from the exercise of a management right that results in an impact or reasonably foreseeable impact on bargaining unit employees which is no more than *de minimis*." *Department of Health and Human Services, Social Security Administration, Chicago Region*, 15 FLRA 922 (1984). Thereafter, in *Department of Human Services, Social Security Administration, Region V, Chicago, Illinois*, 19 FLRA 827 (1985) the Authority indicated that while the totality of facts and circumstances would be considered when determining whether the impact of such a change was more than *de minimis*, various factors should be carefully considered, including, but not limited to, the following: The nature of the change (*e.g.*, the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (*i.e.*, duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past.

In the case herein, while the duties of virtually all employees apparently remained the same, two Computer Room positions were eliminated and five employees on the morning shift had a substantial change in their tours of duty when assigned to the "new" morning shift. Four of those employees lost 6 to 7 hours of night shift differential pay and the one employee reassigned to the evening shift lost approximately two hours night differential pay. Further, the existing shifts which remained were changed one hour. Thus the hours available for flex-time selection was changed for all Computer Room employees. The change was permanent and no established procedure existed for handling disputes arising from such a change.

The realignment further resulted in transferring a Clerk to the evening shift and establishing a Lead Mail Clerk position on that shift and eliminating a Peripheral Machine Operator's position or Computer Clerk's position on the existing day shift. Thus, while the bargaining unit at NPSC consisted of approximately 1600 employees, the elimination or change of the morning shift had an impact on not only all employees on that shift but in some degree the hours of all 25 Computer Room employees as well.

In my view changing shift hours of employees, even when employees' hours are changed by only an hour, results in a substantial impact on those employees. Traffic patterns and attendent traffic jams vary with the mass movement of people in this society and affect employees to some degree, depending upon employees' hours of work. Indeed, an hour can make a significant difference in the transportation time required by an employee to arrive at work and arrive home. Availability of car pools, parking and public transportation and safety are matters which similarly affect employees as are matters related to making arrangement for baby sitters and meeting other non-employment commitments. Accordingly, I conclude under all the circumstances herein, where the changes described here impacted substantially on a significant number of employees in the Computer Operations Section and all employees in that section to some degree, the totality of the impact by the change was more than _de minimis_ and Respondent was not privileged to refuse to bargain on the Union's proposal.

I further reject Respondent's contention that section 7116(d) bars the processing of the unfair labor practice charge herein. The grievance alleged to bar the unfair labor practice charge was filed not by the Union but by individual employees who were not even officers of the Union. Further, the grievance does not address Respondent's refusal to negotiate, the subject of the unfair labor practice charge.

In view of the entire foregoing I conclude Respondent violated section 7116(a)(1) and (5) of the Statute and recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Social Security Administration and Social Security Administration Northeastern Program Service Center shall:

1. Cease and desist from:

(a) Changing Computer Operations Section shifts without completing bargaining with the American Federation of Government Employees, AFL-CIO, Local 1760, the agent of the exclusive representative of its employees, concerning the procedures which management officials will exercise in effectuating the change and appropriate arrangements for employees adversely affected by the change.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, Local 1760, the agent of the exclusive representative of its employees, negotiate to completion over changing Computer Operation Section shifts concerning the procedures which management officials will exercise in effectuating the change and appropriate arrangements for employees adversely affected by the change including negotiating on the Union's bargaining proposal of January 13, 1986.

(b) Post at its Northeastern Program Service Center copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Center Director or a designee and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: October 31, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change Computer Operations Section shifts without completing bargaining with the American Federation of Government Employees, AFL-CIO, Local 1760, the agent of the exclusive representative of its employees, concerning the procedures which management officials will exercise in effectuating the change and appropriate arrangements for employees adversely affected by the change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request of the American Federation of Government Employees, AFL-CIO, Local 1760, the agent of the exclusive representative of its employees, negotiate to completion over changing Computer Operation Section shifts concerning the procedures which management officials will exercise in effectuating the change and appropriate arrangements for employees adversely affected by the change including negotiating on the Union's bargaining proposal of January 13, 1986.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 2, whose address is: 26 Federal Plaza, Room 3700, New York, NY 10278, and whose telephone number is: (212) 264-4934.

[2-CA-50467]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY ADMINISTRATION

Respondent

and

Case No. 2-CA-50467

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding on November 13, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1986)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 30, 1986.

Harold D. Kessler
Director of Case Management

[2-CA-50467]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO

Charging Party

. . . .

Case No. 2-CA-50467

Richard Matthews, Esq.
For the Respondent

Susan Roche, Esq.
For the General Counsel

Cecelia McCarthy
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on October 31, 1985, by the Regional Director for the Federal Labor Relations Authority, New York, New York, a hearing was held before the undersigned on April 16, 1986 at New York, N.Y.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et*. *seq*.

(herein called the Statute). It is based on a first amended charge filed on October 29, 1985 by American Federation of Government Employees, AFL-CIO (herein called the Union) against Department of Health and Human Services, Social Security Administration (herein called the Respondent).

The Complaint alleged, in substance, that (a) on or about June 26, 1985, and at all times thereafter, Respondent refused to bargain over the substance, impact and implementation of HHS Transmittal 84.23 unless the Charging Party submitted substantive proposals prior to the start of negotiations; (b) while Respondent, on or about May 1, 1985, agreed to bargain, upon the submission by the Charging Party of substantive proposals within fifteen days after the receipt by the Charging Party of certain information, Respondent on or about August 12, 1985, and at all times thereafter, refused to bargain in good faith re the substance, impact and implementation of HHS Transmittal 84.23 - all in violation of Section 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated February 28, 1986 denied the aforesaid allegations in the Complaint as well as the commission of any unfair labor practice.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Finding of Fact

1. At all times material herein the Union has been, and still is, the certified exclusive representative of a consolidated nationwide unit of Respondent's employees, including employees who are employed in Respondent's Headquarters and in various field offices, with specified exclusions therefrom.

2. At all times material herein the Union has delegated to American Federation of Government Employees General

Committee[1] authority to act as its representative for the purposes of collective bargaining for the aforesaid unit employees.

3. At all times material herein the American Federation of Government Employees Equal Employment Opportunity Committee[2] has been delegated, by the General Committee, authority to act as the latter's representative for the purpose of collective bargaining for the aforesaid unit employees concerning Equal Employment Opportunity matters.

4. At all times material herein the Union and Respondent have been parties to a collective bargaining agreement covering Respondent's employees in the aforementioned unit. Article 4 thereof, entitled "Negotiations During the Term of the Agreement", provides, *inter alia*, as follows:

> Section 1- General
>
> The Administration will provide the Union reasonable advance notice prior to implementation of changes affecting conditions of employment subject to bargaining under 5 USC 71. Upon notice from the Administration of a proposed change, the designated union representative will notify the designated management representative of its desire to consult or negotiate on the change.
>
> The Union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible,

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[1] This is a committee organization which developed as a result of the national agreement, referred to *infra*, covering six components of Respondent's operations included in the national bargaining unit.

[2] This National EEO Committee consists of Union representatives from Respondent's six components. It is a subcommittee of the Union's General Committee. Its Chairman is Earl Tucker. As a member of the National EEO Committee, Cecelia McCarthy represents the Field Office Component and has been designated to negotiate EEO matters on behalf of the Union's General Committee.

> and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasses Panel for resolution under its rules.
> (underscoring supplied).

5. In a letter dated February 22, 1985[3] Peter D. Spencer, Director of Respondent's Division of Labor Relations wrote a letter to Earl Tucker, as President of SSA, Field Assessment Office Local 1395 and attached thereto HHS Transmitted 84.23 - Processing Discrimination Complaints.[4] The HHS Transmittal was sent to Tucker for his review and comments as soon as possible, and Spencer acknowledged it revised and superseded Personnel Instructions 713-1 which related to EEO[5] matters.

6. Upon receiving the aforesaid letter, Tucker contacted Cecelia McCarthy and designated her as the Union's chief negotiator concerning EEO procedures.

7. Tucker wrote Spencer on March 8 and stated the Union requested to bargain re HHS Transmittal 84.23. He further stated the Union declined Respondent's offer to comment on EEO matters since EEO is a condition of employment and therefore a mandatory subject of collective bargaining. A copy of the Union's proposed ground rules for negotiation were enclosed with this letter.[6]

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[3] Unless otherwise indicated, all dates hereinaft mentioned occur in 1985.

[4] HHS Transmittal 84.23 is designated as 1613-3A thru 3X (Joint Exh. 2). It supersedes Instruction 713-1 (Joint Exh. 9 attachment). It states under "Background" that it provides new interpretation of policies, and it updates and makes changes mandated by EEOC regulations, court decisions and decisions of the comptroller general.

[5] EEO will be used hereinafter to refer to "Equal Employment Opportunity."

[6] Tucker also mentioned that the proposed changes should not be implemented till all issues were resolved by law, and he further informed Spencer that Cecelia McCarthy was designated as the Union's chief negotiator.

8. McCarthy attempted to contact Spencer on March 26 but was unsuccessful. She spoke to Al Simek, a staff member, who told her that they never received Tucker's letter nor the proposed ground rules. McCarthy wrote Spencer on March 27 referring to the March 8 request by Tucker to bargain re HHS Transmittal 84.23, that she was designated as chief negotiator, and that ground rules were sent with Tucker's letter. In addition, McCarthy enclosed another copy of the Union's proposed ground rules, and she requested, on behalf of the Union various information and documents pursuant to Section 7114(b) of the Statute.

9. The Union's demand to bargain of March 8, and its request for information dated March 27, were responded to on May 1, 1985 in a letter from Spencer to McCarthy. Enclosed therein were Respondent's counterproposed ground rules. Spencer advised the Union representative that he was working with the Office of Civil Rights and Equal Opportunity to provide the information and date requested by the Union, which would not be available till May 10. Further, he stated that Respondent would need the Union's substantive proposals within 15 days from the date the information is sent to the Union.

10. By letter dated June 4 McCarthy advised Spencer that the Union did not accept the unilateral deadlines for its submission of substantive proposals; that the Union asserted its right to negotiate to exchange proposals at the first negotiating sessions. Enclosed in the letter were the Union's counterproposed ground rules.

11. Part of the information requested by the Union on March 27 was supplied by Spencer in a letter written by him to McCarthy on June 26.[7] Further, Respondent's official also included counterproposals to the ground rules.[8] Spencer further stated therein that Respondent had extended the time until 30 days for the receipt of the Union's substantive proposals.

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[7] Respondent submitted therewith Personnel Instruction 713-1 - the previous agency procedure for filing discriminative complaints.

[8] Management's counterproposed ground rules did accept the Union's proposal that the parties would, at the first negotiating session, exchange and discuss the initial proposals and counterproposals.

12. In a letter dated July 8 McCarthy wrote Spencer that the Union does not accept the unilateral deadlines of thirty days to submit substantive proposals.

13. McCarthy sent another letter to Spencer under date of July 25 indicating she had not received all the information requested, and she requested therein certain additional data. She further stated therein that the Union had excluded the June 4 counterproposals entitled "Impasses in Negotiations" and "Availability of Information" from the ground rules counterproposals, which she enclosed, since they are already covered by the Statute. In addition, the Union's counterproposals, as McCarthy informed Spencer, now excluded language from the prior June 4 proposed ground rules: Point 2 under "Procedures"[9] and Point 2 under "Authority"[10] since the Union declared them to be non-negotiable. (Joint Exh. 11).

14. On August 1, Spencer replied to McCarthy's letter of July 8. He stated that the ground rules referred to by the Union representative do not relieve that Union of its obligation under Article 4, Section 1 of the National agreement to provide Respondent with substantive proposals before negotiations. Further, that Respondent was not making ground rule negotiations contingent upon the receipt of substantive proposals. Spencer also provided further data, as requested, and explained that other requested information was not maintained by management. Finally, Respondent's official stated that unless they received substantive proposals from the Union within 10 work days from receipt of this letter, Respondent would proceed to implement HHS Transmittal 84.23.

15. After receiving the August 1 letter McCarthy called Bill Day, a labor relations representative for Respondent, to inquire about the 10 day deadline imposed by management and to mention the differences in the ground rules suggested by both parties. Day was unable to answer or respond to his inquires.

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[9] This provided that an individual serving as a negotiating committee member may be replaced by an alternate to be entrusted with the same right to speak for and bind the replaced member.

[10] This provided that the Union negotiating committee is authorized to negotiate all matters subject to negotiation, and the Union would be bound by any agreement it enters into.

On August 13 McCarthy talked to Day again, pointing out that the 10 day deadline was unreasonable since Respondent had not replied to her July 25 letter. Initially Day answered that management could not therefore adhere to that deadline, but then stated that a letter had been prepared to respond to the Union's July 25 letter and that the 10 day deadline still applies. Day also mentioned that because the Union excised the section in its ground rules re the authority of the Union's negotiators, Respondent interpreted such actions to mean that the Union would send negotiators to the table who didn't have authority to bargain. McCarthy told Day the Union took that section out only because it was non-negotiable. She tried to discuss it with Day but he did not want to get into the ground rules. McCarthy offered to take out the sections on management's authority if that would resolve the issue, but Day did not care to discuss it.

16. On August 16 McCarthy received a letter, dated August 12, from Spencer which responded to her letter of July 25. With respect to the Union's request for FPM material, Spencer said that such material is not "data" within 7114(b) of the Statute. Further that the Union's latest ground rule proposals would require Respondent to bargain with union representative who do not have Authority to bind their side. Spencer indicated that the Union's proposal is violative of the obligations to bargain in good faith. Thus, the Respondent felt it has fulfilled its obligation under the Statute and intends to proceed with implementation of HHS Transmittal 84.23.

17. McCarthy replied to Spencer's letter of August 12 in a letter dated August 16 wherein she recited her conversations with Day earlier in the month, including her attempts to discuss the matter with Day and his refusal to do so. Spencer did not reply to McCarthy's letter.

18. On August 16 McCarthy filed with the Federal Mediation and Conciliation Service, on behalf of the Union, a request for mediation over an impasse in the ground rules negotiations.11/

11/ Since an unfair labor practice charge was filed by the Union, the FMCS deferred any action on the request until the Authority reached a decision in the unfair labor practice case.

19. By letter dated September 23 Spencer informed McCarthy that management would not pose as an issue the authority of Union negotiators as a condition to bargaining. He also stated that Respondent has previously taken the position that most of the ground rules were unnecessary as they were provided for by Statute or the national agreement. Spencer advised the Union representative that management was ready to proceed further in the matter. He enclosed proposed ground rules and reiterated the request that the Union furnish Respondent with substantive proposals.

20. In a memorandum dated October 7 Respondent issued instructions to its Executive Staff to implement HHS Transmittal 84.23 for all bargaining unit employees. It was so implemented by Respondent.

21. Record facts reflect that on several occasions in the past, during negotiations on the national level, ground rules have been submitted without substantive proposals.

22. The ground rules submitted by the Union and addressed by Respondent, between March 8 and July 25, covered the following matters:

(a) Procedures (negotiating committee members)
(b) Official time for union members of said committee
(c) Time and Place of Negotiations
(d) Negotiations Routine
(e) Technical Advice and Assertions
(f) Impasse in Negotiations
(g) Committee Caucuses
(h) Maintenance of Records
(i) Availability of Information
(j) Time frames
(k) Distribution of Agreement and Training of union officials and employees affected
(l) Authority of Negotiators

In respect to some of the proposals, the Union and management concurred whereas proposed revisions were offered by the parties as to other provisions. (Joint Exhibits 4, 6, 8, 9, 11).

Conclusions

It is contended by General Counsel that Respondent had an obligation to bargain over the substance of its decision to implement HHS Transmittal 84.23 which contains new agency procedures for filing of EEO discriminative claims by unit employees. Further, it is asserted that Respondent was obliged to bargain over ground rules beforehand, and that the agency was not warranted in requiring prior submission from the Union of substantive proposals. By breaking off negotiations and refusing to bargain re the implementation of HHS Transmittal 84.23, the Respondent allegedly acted in bad faith and violated 7116(a)(1) and (5) of the Statute.

In contending otherwise, Respondent makes four particular arguments which constitute the principal issues herein. They are as follows: (1) Respondent has no obligation to bargain re HHS Transmittal 84.23 since it applies to the procedure utilized in the statutory EEO Discrimination Complaint process; that it is not required to deal with the Union as to issues involving a statutory procedure but is precluded from doing so under Section 7121 of the Statute; (2) the Union waived its bargaining right by not submitting substantive proposals within a reasonable time after receiving notice from Respondent; (3) Respondent initiated the new procedures upon the directive of a higher level authority, and therefore cannot be held responsible for its implementation; (4) No changes of a significant nature occurred under the new procedure so as to justify any obligation to bargain.

(1) It is argued by Respondent that the EEO Discriminatory Process is not a condition of employment, nor is it a grievance under the Statute. Since this process, it is asserted, is specifically provided for by the Civil Rights Act of 1964 and is a separate statutory appeals procedures, an employee must, under Section 7121(d) of the Statute, elect to utilize the negotiated grievance procedure or this statutory procedure. The Union is not given the right to negotiate a federal statutory appeals process,[12] and, in fact, 7103(a)(14) provides that "conditions of employment" do not include matters specifically provided for by Federal Statute.

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[12] Respondent adverts to the 9th Circuit Court's decision in Internal Revenue Service, Fresno California v. Federal Labor Relations Authority, 706 F. 2d. 1019 (1983) to support its contention that the Union has no rights re negotiation of EEO procedures. That case only decided that an EEOC claim of discrimination was not a grievance under 7114(a)(2)(A) of the Statute.

It is true that the Civil Rights Act of 1964, as amended, outlawed discrimination of employees based on race, color, religion, sex and age.[13] Further, it established an Equal Employment Opportunity Commission whose function is to eliminate unlawful employment practices by informal means leading to voluntary compliance. In pursuance thereof, the Commission issued regulations as to processing of EEO complaints by each Federal agency.[14] Under these regulations it is provided that each agency must issue its new regulations re the internal processing of complaints.[15] While an employee may appeal to the Commission if an agency rejects his complaint, the Commission is not empowered to adjudicate claims or impose sanctions. It has no legally binding power.

However, I do not subscribe to Respondent's position that since the EEO Discrimination Complaint Process is specifically provided for by the Civil Rights Act of 1964, the EEO program itself is not a condition of employment with respect to the procedures set up by an agency. The particular rules established by the agency are not mandated by EEO regulations. It is left to the agencies to set up their own regulations. Of particular significance is the following language of the Authority in *U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri*, 22 FLRA 657:

> "The Authority finds that, while the EEOC has the authority to issue regulations that take precedence over other laws when such regulations apply to EEO's own proceedings (See *Internal Revenue Service, Fresno Service Center, Fresno, California v. FLRA*, 706 F. 2d. 1019 (9th Cir. 1983), its procedural regulations such as here involved serve rather as guidelines to agencies, and *do not have the force and effect of "law" as that term is used in Section 7114(b)(4) of the Statute.*" (underscoring supplied).

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[13] 42 U.S.C. 2000 (e) *et. seq.*

[14] 29 CFR 1613

[15] 29 CFR (613.211-222

The fact that forms of discrimination are outlawed by statute, and that the Commission was set up to investigate complaints of discrimination as well as encourage resolution of disputes, does not mean that an agency's procedures with respect thereto fall outside conditions of employment. The personnel policies and practices re EEO matters still remain with the agency, and they are not specifically provided for by statute (Civil Rights Act of 1964, as amended) so as to be excepted from 'condition of employment' under 7103(14). This conclusion is evidenced by the Authority's decision in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 615-616 wherein it was determined, inter alia, that a proposal by the union to establish equal opportunity plans and specifying the contents thereof relate to the conditions of employment of employees and are within the agency's duty to bargain.[16] Accordingly, I reject this particular defense and conclude Respondent has an obligation to bargain over HHS Transmittal 84.23 unless otherwise excused by special considerations.

(2) The parties are in sharp dispute as to whether the Union was derelict by its failure to submit substantive proposals to the agency. Moreover, they disagree concerning whether it was proper for the Union to insist upon negotiating ground rules to impasse before it gave management such substantive proposals. The Union contends that the implementation of the EEO procedures, as changed, was a refusal to bargain in light of Respondent's not completing ground rule negotiations. Respondent takes the position that the Union's refusal to submit substantive proposals frustrated the clear intent of the bargaining agreement between the parties.

The Authority has dealt with situations where, in the course of negotiations concerning changes to be made by management, a union has proposed certain governing ground rules. Thus, in Department of Health and Human Services, Social Security Administration and Office of Hearings and Appeals, Region II, 17 FLRA 368, the agency met with the union re the opening of a new Bronx office and a relocation of the Syracuse Hearing office. The union gave management certain proposed ground rules for negotiations, but the agency refused to negotiate over ground rules. Such refusal to negotiate ground rules was held to constitute a failure to bargain in good faith in violation of 7116(a)(1) and (5) of the Statute. In Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 16 FLRA 944, management insisted there was no obligation to bargain re ground rules except during formal contract negotiations. Accordingly, it refused to negotiate ground rules proposed by the union prior to bargaining over a contemplated upward mobility program to be implemented by the employer. It was held by the Authority that the failure to bargain over such ground rules, proposed after the intended change, was violative of 7116(a)(1) and (5).

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[16] Note is also taken of Judge Chaitovitz's decision in Department of Health and Human Services, Social Security Administration, Case No. 3-CA-50448, OALJ-87-02 (October 10, 1986) wherein he concluded that the EEO program and the achievements of its goals are terms and conditions of employment and are negotiable.

It is clear that, under the foregoing rulings, an agency is required to bargain re ground rules to be established for negotiations concerning proposed changes in employment conditions. However, the case at bar presents a different issue. The Respondent herein did not refuse to bargain over ground rules. Contrariwise, it submitted counterproposals for ground rules on May 1 and June 25, adopting some of the Union's proposed rules and making suggested modifications of other ground rules. General Counsel also adverts to Environmental Protection Agency, 16 FLRA 602 in support of its contention that a union may insist that the parties negotiate ground rules before negotiating the implementation of certain performance standards. In the cited case the agency disregarded the request to negotiate ground rules and implemented the standards when the union refused to submit substantive written proposals. Management's refusal to consider ground rules, and discuss them prior to the submission of substantive matters, renders that case inapposite herein. I am persuaded that, based on the communications between the parties, Respondent herein was willing to, and did, negotiate the ground rules before the parties met to bargain re the changes in the EEO procedures.[17] In this respect note is taken that

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[17] General Counsel argues that the Union's deletion of its negotiator's "authority" from the ground rules was used by Respondent to terminate negotiations on implementing HHS Transmittal 84.73 and demonstrates bad faith bargaining. I do not agree. Apart from not excusing the Union's refusal to send substantive proposals, Spencer agreed on September 23 with such deletion.

Respondent's Director of Labor Relations, Peter Spencer, advised Union representative Cecelia McCarthy by letter dated August 1 that "we are not, of course, making ground rules negotiations contingent on receipt of substantive proposals." (underscoring supplied).

Still left for determination, however, is whether Respondent was entitled to implement the new EEO procedures in view of the Union's failure and refusal to submit substantive proposals. Consideration must be given to Article IV, Section 1 of the National Agreement which imposes certain obligations on both parties when changes in conditions of employment are contemplated by management. Thus, the latter must notify the Union of proposed changes and the bargaining representative is obliged to advise the agency of a desire to negotiate. Further, the Union is required to submit written proposals if applicable within a reasonable period after notice of the proposed change.

While I do not view the contractual language in Article IV, Section 1 of the agreement as a waiver by the Union of its right to require Respondent to negotiate ground rules, the parties have apparently imposed dual obligations when management intends to implement changes in employment conditions. Thus, whereas management must notify the bargaining agent of contemplated changes and afford it an opportunity to negotiate thereon, the Union is obliged to submit written proposals after such notification within a reasonable time. It seems self-evident, moreover, that the obligation imposed upon the Union includes, if it is not solely referable to, the submission of substantive proposals re the intended changes. The thrust of the language in Article IV, Section 1 is to commence negotiations on the changed working conditions, and this would necessarily involve the substance thereof. Further, the requirement that the Union submit such proposals in a reasonable time demonstrates an intention that the negotiations on the changes be conducted expeditiously.

In the instant case Respondent first notified the Chairman of the Union's National EEO Committee on February 22, 1985 re the HHS Transmittal 84.23, dealing with revisions concerning the processing of discrimination complaints. Both parties continually communicated with each other between that date and August 12, 1985. During such period both the Union and Respondent exchanged written proposals and counterproposals concerning ground rules, and Respondent furnished requested data to the Union.

Nevertheless, despite repeated requests by management, the Union refused to submit substantive proposals and insisted upon bargaining to improve upon the ground rules. In my opinion such insistence does not comport with a good faith obligation required of the Union to negotiate the intended changes expeditiously.[18] A period of nearly eight months elapsed between the notification by Respondent to the Union of the intended changes and the implementation thereof. During such interval, as prompted by the Union, the focus was on ground rules. These factors impel the conclusions that such insistence by the Union upon ground rule negotiations and, at the same time refusing to send management substantive proposals, thwarts the intent of expeditious bargaining on contemplated changes as expressed in the collective bargaining agreement. Under such circumstances I conclude that Respondent's insistence upon being furnished the Union's proposals re HHS Transmittal 84.23 was warranted. Further, that by implementing such EEO procedures on October 17, 1985, after the Union refused to submit its substantive proposals thereon, Respondent did not refuse to bargain on the substance, impact and implementation of such procedures.[19]

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[18] To this extent I subscribe to the conclusion reached by Judge Chaitovitz in Department of Health and Human Services, Social Security Administration and Social Security Administration, Office of Field Operations, New York Region, Case Nos. 2-CA-40051 and 2-CA-40102, (OALJ-85-114), July 26, 1985. It was concluded therein that the union's insistence upon submitting extensive ground rules before negotiating the change frustrated the clear object of Article IV, Section 1 of the agreement involved herein.

[19] In Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region, 23 FLRA No. 62, the Authority concluded that case involved contract interpretation of Article 4, Section 1, and it held that management did not commit an unfair labor practice by refusing to proceed with ground rule negotiations until the union submitted substantive proposals. I do not view that case as controlling. The parties herein had not consistently disputed the meaning of the contract nor were involved in its breach. Respondent had negotiated proposed ground rules for several months with the Union before implementing the revised EEO procedures.

Having concluded that Respondent did not violate Section 7116(a)(1) and (5) of the Statute as alleged, it is recommended that the Authority adopt the following Order:[20]

ORDER

IT IS HEREBY ORDERED, that the Complaint in Case No. 2-CA-50467 be dismissed in its entirety.

William Naimark
WILLIAM NAIMARK
Administrative Law Judges

Dated: November 13, 1986
Washington, D.C.

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[20] In view of the ultimate conclusions reached by the undersigned and the recommended disposition, no resolution is made of the issues posed by Respondent's defenses designated as (3) and (4), *supra*.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF ARMY
HEADQUARTERS AND DARCOM HQ

Respondent

and

Case No. 3-CA-30280
17 FLRA No. 19
17 FLRA 84

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 476

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order on Remand in the above-entitled proceeding on November 18, 1986, finding that since the complaint had not been pressed, or pursued, by either the General Counsel or the Charging Party, that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 30, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[3-CA-30280]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF ARMY,
HEADQUARTERS AND DARCOM HQ

Respondent

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 476

Charging Party

Case No. 3-CA-30280
17 FLRA No. 19
17 FLRA 84

DECISION AND ORDER ON REMAND

Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit, National Federation of Federal Employees v. Federal Labor Relations Authority, 789 F.2d 944 (1986), ". . . to allow the General Counsel to pursue this charge with the Authority." (789 F.2d at 948). By Order dated September 23, 1986, this case was transferred to the Office of Administrative Law Judges and duly assigned to the undersigned.

Findings

1. On October 7, 1986, I issued an Order On Remand, which, after setting forth the pertinent portions of the Complaint (issued May 10, 1983), the Stipulation of the parties (entered into on July 21 and 22, 1983) pursuant to which the case was transferred to the Authority for decision by Order dated August 3, 1983, the Authority's decision of February 28, 1985, the decision of the United States Court of Appeals for the District of Columbia Circuit, correspondence between Mr. Harold D. Kessler, Director of Case Management, and General Counsel John C. Miller[1], and

---

[1] In paragraph 6, at page 7, after noting Mr. Kessler's letter dated August 7, 1986, to General Counsel Miller, I stated,

(footnote continued)

the Order dated September 23, 1986, transferring this case to the Office of Administrative Law Judges, and its assignment to the undersigned,

> ". . . to ascertain the position of the parties and for proceedings consistent with the Court's Order."

it was Ordered, in part, that

> "A. The General Counsel shall on, or before, October 22, 1986, notify the undersigned and all parties, in writing, whether he intends to pursue this matter."
>
> > [Paragraph B provided that if the General Counsel states that he intends to pursue this matter, all parties shall submit, in writing, on, or before November 12, 1986, their positions will regard to three questions posed by the decision of the Court of Appeals and a fourth question, namely, the effect on i), ii) and iii) of the parties' Stipulation]

2. On October 22, 1986, General Counsel, John C. Miller, filed with the undersigned his Response To Order On Remand in which he stated that the General Counsel has decided not to pursue the subject case. His response stated, in part, as follows:

1/ (footnote continued)

> "The file does not reflect the response, if any, to Mr. Kessler's letter of August 7, 1986." (Order On Remand page 7).

In General Counsel's Response To Order On Remand, set forth in pertinent part infra, it was shown that General Counsel Miller did, indeed, respond to Mr. Kessler's letter of August 7, 1986, by his letter dated August 12, 1986, a copy of which was attached to General Counsel's Response To Order On Remand and which I hereby expressly incorporate as part of the record.

> ". . . The intent of the General Counsel, in authorizing complaint in the subject case, was only to allege that the disapproval during the section 7114(c) review process, in and of itself, was violative of the Statute. The General Counsel did not intend to litigate whether the particular Panel clause was contrary to law, rule or regulation or whether disapproval of the particular Panel clause was a violation of the Statute. Rather, the Office of the General Counsel only intended to advance the proposition noted above which was rejected by the Authority in its Interpretation and Guidance while this matter was pending before the Authority.
>
> "Accordingly, the General Counsel has determined not to pursue the subject case under these circumstances. In view of this determination, the General Counsel finds it unnecessary to take a position with respect to the further issues set forth by the D.C. Circuit and in the Judge's Order on Remand regarding which party has the burden of alleging and establishing whether a rejected contract clause during a section 7114(c) review process is indeed contrary to applicable law, rule, or regulation. Rather, the General Counsel has concluded to litigate this issue in other cases wherein the specific facts and circumstances render this issue ripe for determination.
>
> Accordingly, in response to the Judge's Order On Remand of October 7, 1986, the General Counsel, for the above-stated reasons, has decided not to pursue the subject case." (General Counsel's Response To Order On Remand, pp. 3-4).

General Counsel's Response To Order On Remand in its entirety is hereby incorporated as part of the record.

3. On October 24, 1986, I issued an Order To Show Cause which stated, in part, as follows:

> "The General Counsel on October 22, 1986, filed a Response to Order on Remand, which was duly served on all parties, in which he concluded,
>
> > 'Accordingly, in response to the Judge's Order On Remand of October 7, 1986, the General Counsel, for the above-stated reasons, has decided not to pursue the subject case.'
>
> "In the Order On Remand, all parties were to submit on, or before, November 12, 1986, their positions with regard to four specific questions *if* the General Counsel stated that he intends to pursue this matter; but no provision was made for response in the event General Counsel stated that he did not intend to pursue this matter.
>
> "NOW THEREFORE, it is further
>
> "ORDERED that any party may on, or before November 12, 1986, respond to General Counsel's Response To Order On Remand to show cause why the Complaint should not be dismissed in view of General Counsel's decision not to pursue the subject case."

4. On November 12, 1986, the Charging Party, National Federation of Federal Employees, by its General Counsel, H. Stephan Gordon, filed a response to the Order To Show Cause disclaiming any interest in the further processing of this matter. The response of National Federation of Federal Employees stated as follows:

> "In response to your ORDER TO SHOW CAUSE dated October 24, 1986, please be advised that the Charging Party in the above captioned case [3-CA-30280] herewith disclaims any interest in the further processing of this matter, without prejudice to the Charging Party's right to raise the issues in question in future negotiations or future litigation.

> "In view of the fact that the General Counsel has decided not to pursue the subject case, little purpose would be served by the Charging Party's insistence on further litigating the matter. Although, as a party to this proceeding, we believe that the charging party, with the Administrative Law Judge's approval, has a statutory right to pursue the matter even without the participation of the General Counsel, we believe that the issues presented herein are of such import that they should be fully litigated only with the fullest voluntary cooperation and participation by the Office of the General Counsel. Neither the development of statutory clarification nor the interpretation of the Court's remand would be particularly well served by an ex-parte proceeding which would be further encumbered by various procedural questions and possible extraneous litigation regarding the scope of the Court's remand and the charging party's standing to litigate the case without the General Counsel's participation.
>
> "Our decision not to pursue this matter further is also influenced by the fact that an inordinate amount of time has elapsed since the alleged violation has occurred and no meaningful remedy for the violation could be obtained in the foreseeable future. Under these circumstances, we believe that the parties as well as the Authority will be better served by raising the contested issues in future negotiations wherein the parties will be aided by the principles enunciated in the Court's decision."

Although Charging Party's response has been set forth in full, Charging Party's response is, nevertheless, hereby incorporated as part of the record.

Conclusion

The United States Court of Appeals for the District of Columbia Circuit remanded this case to the Authority, ". . . to allow the General Counsel to pursue this charge with the Authority." (789 F.2d at 948). General Counsel has decided not to pursue the subject case and the Charging Party, National Federation of Federal Employees, Petitioner before the Court of Appeals, has, also, disclaimed any interest in the further processing of this case. Accordingly, as the Complaint has not been pressed, or pursued, by either the General Counsel or the Charging Party, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 3-CA-30280 be, and the same is hereby, dismissed.

William B Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 18, 1986
Washington, D.C.

☆U.S. G.P.O. 1987-181-223:60002

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3/No. 66

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 66

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

April 14, 1986

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UNFAIR LABOR PRACTICE CASES

Case No. 4-CA-60357 (January 16, 1987)

Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia and American Federation of Government Employees, Local 987, AFL-CIO

Case No. 8-CA-60048 (January 30, 1987)

United States Customs Service, Southwest Region and National Treasury Employees Union, Chapter No. 116

Case Nos. 2-CA-50355, 2-CA-50356 and 2-CA-50487 (February 20, 1987)

Department of the Army Heaquarters, Fort Buchanan, Fort Buchanan, Puerto Rico and American Federation of Government Employees, Local 2614

Case Nos. 6-CO-60003 and 6-CO-60014 (March 13, 1987)

American Federation of Government Employees, Local 1920, AFL-CIO, Fort Hood, Texas and U.S. Department of Defense, Departments of the Army and Air Force, Army and Air Force Exchange Service, Dallas, Texas

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*This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with Section 2423.29(a) of the Authority's rules and regulations, the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

3.F31/21-3:

Case No. 6-CO-40016 (March 19, 1987)

American Federation of Government Employees, AFL-CIO, Local 3320 and United States Department of Housing and Urban Development, Region VI, and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office

Case No. 8-CA-60122 (March 19, 1987)

Veterans Administration, West Los Angeles Medical Center, Los Angeles, California and American Federation of Government Employees, Local 1061, AFL-CIO

Case No. 7-CA-60237 (March 20, 1987)

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, AFL-CIO, Local 1592

Case No. 1-CA-60076 (April 14, 1987)

Department of Health and Human Services, Office of Hearings and Appeals, Region I, (Boston, Massachusetts) and National Treasury Employees Union

[4-CA-60357]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
WARNER ROBINS AIR LOGISTICS
CENTER, ROBINS AIR FORCE
BASE, GEORGIA

Respondent

and

Case No. 4-CA-60357

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding on November 14, 1986, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1986)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., January 16, 1987.

Harold D. Kessler
Director of Case Management

[4-CA-60357]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF DEFENSE
WARNER ROBINS AIR LOGISTICS
CENTER, ROBINS AIR FORCE
BASE, GEORGIA

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 987, AFL-CIO

Charging Party

. . . .

Case No. 4-CA-60357

Kenneth Dale Battle, Esquire
For the General Counsel

Kenneth J. Emanuel, Sr., Esquire
For the Respondent

Ms. Nedra T. Bradley
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on March 13, 1986, by Local 987, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or Charging Party), a

Complaint and Notice of Hearing was issued on April 30, 1986, by the Acting Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleges that the Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, (hereinafter called the Respondent) violated Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of the actions of a supervisor in telling an employee that he would not write a letter on his behalf concerning a base traffic ticket because he "went to the Union."

A hearing was held in the captioned matter on June 24, 1986, at Robins Air Force Base, Georgia. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post hearing briefs which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is an agent of American Federation of Government Employees, AFL-CIO, which is the exclusive representative of a consolidated unit of Respondent's employees.

Sometime in the latter part of January 1986, Mr. Thomas P. Spahos, a unit employee, received a base parking ticket. Either the same day or the day after, Mr. Spahos approached his immediate supervisor, Branch Chief Phillip Odom, and informed Mr. Odom that in his opinion the ticket was unjustified. According to Mr. Spahos, he informed Mr. Odom that he did not know what to do and that he was contemplating visiting the Union. Whereupon, Mr. Odom told him to visit the security police office rather than the Union.

Following the conversation with Mr. Odom, Mr. Spahos, on or about January 31, 1986, visited the security police office and complained to Sergeant Claude Todd that the parking ticket was not justified. Sergeant Todd told Mr. Spahos to sit tight and await the formal notification of the parking ticket. Upon receipt of the formal notification, Sergeant Todd suggested that Mr. Spahos secure a statement from his supervisor Mr. Odom wherein the extenuating circumstances surrounding the parking ticket were set forth.

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According to Mr. Spahos, Sergeant Todd told him that he had never seen any reasonable explanation turned down.

Several days later, unbeknownst to Mr. Odom, Mr. Spahos visited the Union, which, after hearing the circumstances surrounding the parking ticket, filed on February 7, 1986, a grievance on Mr. Spahos' behalf. On or about February 24, 1986, Lt. Colonel Leo Turner, Deputy Base Commander, denied the grievance.

On or about February 28, 1986, Mr. Odom received official notice that Mr. Spahos had received a parking ticket in the latter part of January. In accordance with existing regulations, Mr. Odom summoned Mr. Spahos to his office and informed him that he was about to receive a "counseling" for the base parking ticket. Mr. Spahos then informed Mr. Odom of his earlier conversation with Sergeant Todd at the security police office and asked Mr. Odom to write a memorandum on his behalf describing the extenuating circumstances surrounding the parking ticket. According, to Mr. Spahos, Mr. Odom replied, "Paul, be realistic, there is no way I am going to write you a letter or help you after you have been to the Union and been to Colonel Turner." According to Mr. Odom, in reply to Mr. Spahos' request that he write a letter, he stated as follows:

> No. I don't think that would be appropriate. Paul, you have already gotten your decision from the Base Commander, and I received a copy of the decision letter where you went through the negotiated grievance procedure about this parking violation, I don't think it would he appropriate for me to write a letter now about the matter.

Mr. Odom denied ever telling Mr. Spahos "that because he went to the Union, he could not help him." According to Mr. Odom, a letter to the Base Commander on Mr. Spahos' behalf, after the matter had been through the grievance procedure and the Base Commander, would be tantamount to telling the Base Commander, that he had not done a good job investigating the matter in the first instance.

On March 4, 1986, nine days before filing the ULP charge underlying the instant complaint, Mr. Spahos filed a grievance seeking to have the February 28, 1986, counseling removed from his personnel file. The subject of the grievance was "Counseling." The "Remedy sought" was as follows:

(1) Counseling removed from all records of T. Paul Spahos.

(2) Fair and equitable treatment in all aspects of employment.

(3) No retaliation or reprisal for filing a grievance.

In a statement accompanying the grievance Mr. Spahos reiterated the conversation with, and statement of, Mr. Odom which is the subject of the instant complaint and concludes in the statement as follows:

> A supervisor hostile to a union member can find countless ways to retaliate and that is how my parking ticket was used in this case.

The grievance has reached the arbitration stage of the grievance procedure. A reference to the alleged statement of Mr. Odom, which is the subject of the instant complaint, appears in an early reply of the Respondent to the grievance wherein Respondent states that the allegation of "anti-unionism" is unsupported by the evidence. Otherwise the grievance appears to have been decided on the validity of a counseling for a traffic violation.

Discussion and Conclusions

The General Counsel, on the basis of Mr. Spahos' testimony, takes the position that by virtue of Mr. Odom's statement, i.e. that he would not write a letter on Mr. Spahos' behalf because Mr. Spahos had gone to the Union, Respondent violated Section 7116(a)(1) of the Statute because the statement interfered with, restrained and coerced Mr. Spahos in the exercise of his Section 7102 right to seek assistance from the Union. Contrary to the contention of the Respondent, the General Counsel would find that the Complaint is not barred by Section 7116(d) since the grievance and the complaint concern two different issues. Thus, the Complaint concerns the statement of Mr. Odom while the grievance concerns the counseling. Although the statement accompanying the grievance adverted to Mr. Odom's alleged coercive statement, according to General Counsel, it is clear that the grievance only addressed the counseling and that the alleged coercive statement was only included as background.

The Respondent on the other hand takes the position that further action on the Complaint is barred by Section 7116(d) since it is clear that the grievance sought relief from the anti-union animus demonstrated by Mr. Odom. According to the Respondent, inasmuch as Mr. Odom's anti-union animus is the subject of both the Complaint and the grievance, the Complaint should be dismissed since it was filed after the grievance. In the event of a contrary conclusion with respect to the application of Section 7116(d), Respondent urges dismissal of the Complaint on the ground that the General Counsel has not met the burden of proving the allegation of the Complaint by a preponderance of the evidence. In this latter connection it is the Respondent's contention that Mr. Odom's testimony should be credited over the testimony of Mr. Spahos.

In agreement with the Respondent, I conclude that the grievance and the Complaint both encompassed the alleged coercive statement of Mr. Odom. In support of this conclusion I note that Mr. Spahos under "remedy sought" stated no retaliation for filing a grievance. In order to decide whether there was retaliation, the alleged coercive statement of Mr. Odom would have to be considered. In fact the statement must have been considered since as noted in the factual summary, Respondent at an early step of the grievance procedure informed the Union that the allegation of "antiunionism" was unsupported by the evidence. Accordingly, since the grievance was filed prior to the charge underlying the instant complaint, I find that Section 7116(d) bars further action on the Complaint.

Moreover, and in any event, based primarily upon my observation of the witnesses and their demeanor, I credit Mr. Odom's version of the February 28, 1986 conversation with Mr. Spahos and find that he, Mr. Odom, did not state to Mr. Spahos that because he had gone to the Union he, Mr. Odom, would not write a letter in his, Mr. Spahos' behalf. In reaching this latter conclusion, I do not believe Mr. Spahos has deliberately misstated the conversation with Mr. Odom, but rather find that he has misinterpreted Mr. Odom's stated reasons for denying him the requested letter.

Accordingly, in view of the foregoing findings and conclusions, it is hereby recommended that the Federal Labor Relations Authority issue the following Order dismissing the Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED, that the Complaint should be, and hereby is, dismissed in its entirety.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: November 14, 1986
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES CUSTOMS SERVICE
SOUTHWEST REGION

Respondent

and

Case No. 8-CA-60048

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION
CHAPTER NO. 116

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on December 19, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., January 30, 1987.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES CUSTOMS
SERVICE, SOUTHWEST REGION

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER
NO. 116

Charging Party

Case No. 8-CA-60048

Jonathan S. Levine, Esq.
For the General Counsel

Robyn M. Bacon, Esq.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq. (herein called the Statute). It was instituted by the Regional Director of Region 8 based upon an unfair labor practice charge filed on November 25, 1985 and amended on February 3, 1986 by the National Treasury Employees Union (herein called NTEU) and the National Treasury Employees Union, Chapter No. 116 (herein called the Local) against United States Customs Service, Southwest Region (herein called Respondent). The Complaint alleged that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to recognize Art Voss as the Local's chief steward despite the Locals designation of Mr. Voss as its chief steward.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Tucson, Arizona at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the parties and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

A. Failure to recognize the Local's designation of Mr. Art Voss as its Chief Steward.

Before retiring in February 1984, Mr. Art Voss worked for the Customs Service in Nogales, Arizona for approximately 17 years. During his employment, Mr. Voss held several official positions with the Local including Local Chapter President from 1980 until he was elected NTEU national vice-president in August 1985, after he retired. NTEU apparently has a policy prohibiting an individual from holding more than one elective office at a time requiring Voss' resignation as local chapter president. From February 1984 until his resignation as local chapter president, Voss represented the Local throughout the Nogales District in dealing with Respondent on adverse actions, second step grievances and during negotiations.

By letter dated October 4, 1985, Local Chapter President Don Bolding informed Respondent of the Local's designation of its stewards. Mr. Voss was designated as the Local's chief steward. Respondent's District Director Peter F. Gonzalez replied on October 8, 1985, informing both the Local and NTEU that it interpreted Article 33, Section 4 of the parties agreement[1] to preclude it from recognizing

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[1] Article 33, Section 4 of the parties collective bargaining agreement provides:

> Each steward, chief steward, and Chapter President shall be assigned a specific

(footnote continued)

Mr. Voss as chief steward. Respondent suggested during the hearing that its primary concern was one of "security." Despite its official position in correspondence during October 1985, Respondent apparently continued, at least during that month, to deal with Mr. Voss as a chief steward.

Although Mr. Voss was "entitled to the normal courtesies granted all nongovernment employees," Respondent on November 21, 1985 made clear to all its enforcement offices that it did "not recognize Art Voss as the chief steward."

B. Bargaining history of Article 33 Section 4 of the collective bargaining agreement between NTEU and Respondent.

Article 33, Section 4 of the Agreement is identical to the numbered article in the parties previous agreement. Prior to consolidation of NTEU's regional units in late 1977, early 1978, regional contract negotiations, which included stewards' use of official time, had begun. During those regional negotiations, management impressed upon the local unions that its chief concern on the issue of employee representation and official time was a financial one. Respondent's concern being that if stewards were allowed to represent employees in a different city it might be required to pay travel and per diem.

Nowhere in the 1980 or the 1983 contract does it state that employee representatives of the Locals must be employed by Respondent in order to perform their representational duties. In fact, Respondent has dealt with NTEU National Representative Jim Thornton although he is not employed by Respondent. Moreover, as the evidence has already shown,

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1/ (footnote continued)

> representational area. The steward, chief steward, and Chapter President shall be employed within his representational area and shall restrict his activities to that representational area. When seeking Union assistance during working hours under this Agreement, or under Chapter 71, Labor-Management Relations, Title 5, United States Code, employees in a representational area shall receive such assistance only from the steward, chief steward, or Chapter President designated to represent that representational area.

Respondent dealt with Mr. Voss while he was not employed by the Customs Service. While Respondent raises "security" as one of its present concerns for not having non-employee chief stewards, such a position was never raised during either the 1980 or 1983 negotiations.

Discussion

The Complaint alleges that on October 4, 1985, and continuing to date, the Local requested and has continued to request that Respondent recognize Art Voss as its chief steward, and since on or about October 8, 1985, Respondent through its District Director Peter Gonzalez has refused and continues to refuse to recognize Art Voss as the Local's chief steward.

Respondent contends that the NTEU has clearly and unmistakably waived its statutory right to choose certain individuals to occupy the positions of chief steward. Alternatively, Respondent argues that the matter is one of contract interpretation more properly decided by an arbitrator rather than by this forum.

The General Counsel argues that under established case law Respondent's action is, in essence, defenseless since it is abundantly clear that a labor organization holding exclusive recognition has the right to select its own representatives when dealing with agency management.[2]

In the Fort Bragg case, supra, the respondent similarly refused to recognize the designation of a steward who had previously been terminated from its employment based on its interpretation of the agreement between the parties. There the FLRA concluded that the contract article relied on contained no clear and unmistakable waiver of the Union's statutory right to choose its own stewards or representatives or any restriction requiring those selected by the Union for such position to be employees of the respondent. The plain language of the Article 33, Section 4 of the NTEU agreement and the bargaining history offered does not demonstrate that the parties intended to create a clear and unmistakable clause that the chief steward, as Respondent contends must be an employee of the Customs Service. Furthermore, evidence offered by Respondent that it interpreted the article in that manner, in the past, without an unfair labor practice charge being filed does not prove such a waiver. Absent a clear and unmistakable waiver, a party will not be deemed to have given up a statutory right, such as a labor organization's right to designate its representatives and stewards.[3]

---

[2] See, Department of Health and Human Services, Food and Drug Administration, Region II, New York Regional Laboratory, 16 FLRA 182 (1984); Department of Defense, Department of the Army, Headquarters, XVIII Airborne Corps, and Fort Bragg, 15 FLRA 790 (1984); Department of the Air Force, 915th Tactical Fighter Group, Homestead Air Force Base, Florida, 13 FLRA 135 (1983); American Federation of Government Employees, AFL-CIO, 4 FLRA 272 (1980).

Concerning the issue of contract interpretation, under the Executive Order the Assistant Secretary under like circumstances in Internal Revenue Service, Omaha District Office, A/SLMR No. 417, 4 A/SLMR 493 (1974) asserted jurisdiction, rejecting Respondents argument that the parties to a negotiated agreement should be left to pursue contractual rather than unfair labor practice remedies. In declining to withdraw jurisdiction he found that the question in that type case is whether a party to such an agreement had given up the rights granted under the Order. In viewing the contractual language alleged by the agency as limiting the right of choice by the labor organization to currently employed individuals rather than a retired employee, the Assistant Secretary pointed to other language which arguably could have been interpreted in another manner. This case is analogous inasmuch as a reading of Article 33, of the agreement, in its entirety, does not answer decisively whether or not the interpretation urged by Respondent is correct. Accordingly, since a statutory right is involved herein, Respondent's contention that the matter is one for contract interpretation, is rejected.[4]

Based on the foregoing, it is found that Respondent was obligated to recognize the Union's designation of Mr. Voss as its chief steward and its failure to do so beginning on or about October 8, 1985 constituted a failure to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute.[5] Accordingly, it is recommended that the Authority adopt the following:

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[3] Social Security Administration, 13 FLRA No. 69, 13 FLRA 409 (1983); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2, 5 FLRA 9 (1981).

[4] In view of the above disposition it is unnecessary to pass on Respondent's position that a past practice had not been established.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the United States Customs Service, Southwest Region shall:

1. Cease and desist from:

(a) Failing and refusing to recognize Art Voss as the designated chief steward of the National Treasury Employees Union and National Treasury Employees Union, Chapter No. 116, the Nogales, Arizona employees' exclusive representative.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Recognize Art Voss as the designated chief steward of the National Treasury Employees Union and National Treasury Employees Union, Chapter No. 116, the employees' exclusive representative.

(b) Post at its Southwest Region facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Respondent's Nogales, Arizona District Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that Notices are not altered defaced, or covered by any other material.

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[5] Although not alleged in the Complaint Respondent's conduct would also constitute an independent violation of section 7116(a)(1) of the Statute since it interferes with employee collective bargaining. See, Fort Bragg, supra.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: December 19, 1986
Washington, D.C.

[8-CA-60048]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to recognize Art Voss as the designated chief steward of the National Treasury Employees Union and National Treasury Employees Union, Chapter No. 116, our Nogales, Arizona District employees' exclusive representative.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL recognize Art Voss as the designated chief steward of the National Treasury Employees Union and National Treasury Employees Union, Chapter No. 116, our Nogales, Arizona District employees' exclusive representative.

____
(Agency or Activity)

Dated: __________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 8, whose address is: 350 S. Figueroa Street, 10th Floor, Los Angeles, CA 90071, and whose telephone number is: (213) 894-3805.

[2-CA-50355; 2-CA-50356;
2-CA-50487]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BUCHANAN
FORT BUCHANAN, PUERTO RICO

Respondent

and

Cases Nos. 2-CA-50355,
2-CA-50356 & 2-CA-50487

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2614

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on December 24, 1986, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., February 20, 1987.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[2-CA-50355; 2-CA-50356;
2-CA-50487]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BUCHANAN
FORT BUCHANAN, PUERTO RICO

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2614

Charging Party

. . . .

Case Nos. 2-CA-50355
2-CA-50356
2-CA-50487

Lt. Col. Harold E. Fievet, Esquire
For the Respondent

Mr. Ismael Rivera
For the Charging Party

Barbara S. Liggett, Esquire
Cecile M. O'Connor, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns three unfair labor practice complaints issued by the Regional Director, Region II, Federal Labor Relations Authority, New York, New York against the Department of the Army, Headquarters, Fort Buchanan, Fort Buchanan, Puerto Rico (Respondent), based on charges filed by the American Federation of Government Employees, Local 2614 (Charging Party or Union). Separate hearings were held in Case No. 2-CA-50355 and Case No. 2-CA-50356 on December 10, 1985. Subsequently, the General

Counsel moved to reopen the hearings and consolidate them with Case No. 2-CA-50487. The motion was granted over Respondent's objection. The hearing in the consolidated cases, after being postponed due to the availability of witnesses, was held on October 9, 1986.

The Respondent, Charging Party, and the General Counsel were represented at the hearings and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, the following findings of fact, conclusions of law, and recommendations are set out. For ease of reference, these have been separated by case number. Where a finding relates to more than one matter, it has been appropriately considered, but generally not repeated.

II. Case No. 2-CA-50355

A. Statement of the Case

The amended complaint in Case No. 2-CA-50355 alleged, in substance, that Respondent violated section 7116(a)(1), (2) and (8) of the Statute when it denied the request of a bargaining unit employee to be represented by the Charging Party at an examination within the purview of section 7114(a)(2)(B) of the Statute and issued a proposed suspension (June 7, 1985), a decision to suspend (August 8, 1985), and a subsequent reprimand of the employee (November 1, 1985) because of his refusal to participate in such examination. The Respondent's answer denied any violation of the Statute.

B. Findings of Fact

The Charging Party is the exclusive representative of an appropriate unit of Respondent's employees, including employees in Respondent's Operations and Maintenance Division, Directorate of Engineering and Housing. Approximately 55 to 65 employees work in the Operations and Maintenance Division.[1]

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[1] Although the record does not establish the size of the overall bargaining unit, section 1(E) of the Union's charge in this case states the number of employees employed by Respondent as 230 (G.C. Exh. 1(a)).

Ramon Cabrera Vega is an employee in the Operations and Maintenance Division and, since June 26, 1985, has been chief shop steward for the Charging Party. His immediate supervisor is Sergio Hernandez, Chief, Operations and Maintenance Division. On the morning of May 6, 1985, Cabrera decided to visit Respondent's Safety Officer to complain about unsafe working conditions and to deliver photographs which illustrated these conditions, although such action was not part of his ordinary day-to-day duties. Cabrera left a message for his supervisor, Hernandez, with the Utility Clerk, Mrs. Tiller, informing her that he was going to visit the Safety Officer. Before Cabrera left his worksite to go to the Safety Office, he received a telephone call from the Charging Party's national representative, Ismael Rivera, who was calling from the Charging Party's office at Fort Buchanan. Cabrera told Rivera that he was about to go to the Safety Officer to show him the photographs and to tell him about the unsafe working conditions. Rivera advised Cabrera that it was unnecessary for him to go to the Safety Officer and that he should instead bring the photographs to Rivera at the Union office. Tiller was not in the area when Cabrera received the call from Rivera. Since Cabrera had already left a message with Tiller that he would be away from the office, he decided to comply with Rivera's request and so left his worksite and drove to the Union office, which was approximately 2,400 feet distant. While speaking with Rivera in the Union office, Cabrera noticed Hernandez drive by the Union office, looking at Cabrera's automobile and then at the Union office. Later, Cabrera observed Hernandez again pass by the Union office and look at Cabrera's automobile.

Hernandez returned to his office and asked Tiller if she knew where Cabrera was. Tiller told Hernandez that Cabrera had said he was going to the Safety Office. Because Hernandez had seen Cabrera's car outside the Union office, Hernandez suspected that Cabrera had not been to the Safety Office and called that office to confirm his suspicion. The Safety Officer told Hernandez that Cabrera had not been there that morning.

After meeting with Rivera, Cabrera returned to his office.[2] When Cabrera returned to the worksite,

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[2] Cabrera claims he was away from the office only about eight to ten minutes. Hernandez testified in substance that Cabrera was away for more than one-half hour. It is unnecessary to resolve this conflict.

Hernandez called him into his office and in an aggressive manner asked where Cabrera had been.[3] Cabrera told Hernandez that he had left a message with Tiller, and that he had been at the Union office. Hernandez told Cabrera to sit down, that he wanted to talk to him. Hernandez spoke in a very aggressive tone and not in his normal manner. Cabrera told Hernandez that if he wanted to talk about any disciplinary matter, Cabrera would not meet without a representative. Hernandez insisted that Cabrera sit down. Cabrera reiterated if Hernandez wanted to take action against him, then he needed representation, and refused to sit down.[4] Cabrera then left the supervisor's office. Because he was upset by the confrontation with Hernandez, he requested and received annual leave for the remainder of the workday.

Hernandez testified that he asked Cabrera where he had been only to get the conversation started; that he did not intend to ask him any more questions; that he only wanted to counsel Cabrera about the correct procedure for requesting leave; and that had Cabrera stayed at the meeting for such counseling, that would have been the end of the matter.

In his next paycheck following the May 6, 1985 incident, Cabrera noticed that certain monies were missing, and after checking with management learned that one hour's wages had been deducted due to a charge of absence without leave (AWOL) on May 6, 1985. On June 7, 1985, Cabrera received a letter proposing to suspend him for one day for being AWOL, for failure to follow procedures in requesting and obtaining approval of leave, for impertinence, and for insubordination.

According to the letter of proposed suspension, the AWOL charge and the charge for failing to follow procedures in requesting and obtaining approval of leave were based upon Cabrera's going to the Union office without first securing permission from Hernandez. The charges of impertinence and insubordination were based upon Cabrera's refusal to meet with Hernandez on May 6, 1985. Hernandez admits that had Cabrera met and talked with him on May 6, 1985, Hernandez would not have charged him AWOL, proposed the suspension, or taken any other action against Cabrera (Tr. 33-35).

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[3] Hernandez testified that he did not use a loud and aggressive voice. I credit Cabrera on this point.

[4] Hernandez testified that he could not recall that Cabrera made a distinction between whether this was a meeting for disciplinary action or work-related counseling in requesting representation. I have credited Cabrera, although it is clear that section 7114(a)(2)(B) requires no such specificity in an employee's request for representation. As discussed infra, a description of the purpose of the meeting as the outset by the agency representative can be important.

By letter dated June 10, 1985, Cabrera responded to the proposed suspension. The Charging Party filed the Charge against Agency on June 14, 1985. By letter dated August 8, 1985, the Respondent issued its final decision to suspend Cabrera, sustaining all the charges against him. Cabrera filed a grievance over this action on August 12, 1985. On August 21, 1985, Cabrera served a one day suspension.

On November 1, 1985, the Respondent's deputy installation commander, Felix E. Perez, responded in writing to Cabrera's August 12, 1985 grievance. Although he claimed that the issue was not grievable in view of the unfair labor practice charge, Perez acknowledged that Cabrera could reasonably have been "confused" over the nature of the meeting that Hernandez was attempting to conduct with him on May 6, 1985. Consequently, Perez dropped the charges of insubordination and impertinence, but found that the charges of AWOL and failure to follow proper procedures in requesting and obtaining approval of leave were supported. Perez reduced the one day suspension to an official letter of reprimand, and informed Cabrera that he would be reimbursed for one day's pay to cover the suspension which had already been served.

C. Discussion, Conclusions, and Recommendations

Section 7114(a)(2)(B) provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> . . . .
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

The initial issue is whether Mr. Hernandez sought to subject Mr. Cabrera to an "examination . . . in connection with an investigation." Hernandez began the meeting by asking Cabrera where he had been. The fact that Hernandez already knew where Cabrera had been does not defeat a conclusion that in asking this question, Hernandez began an examination in connection with an investigation. One may speculate that perhaps Hernandez wanted to examine Cabrera on this point to learn whether Cabrera would answer truthfully, or to elicit information from him concerning the purpose of his visit to the Union office. One may not reasonably conclude, as Respondent argued at trial, that Hernandez asked the question only as a way to begin the conversation and did not expect an answer. The employee could reasonably be expected to respond by making statements denying, admitting, or explaining his actions, just as the employee did here just before requesting representation.

According to Respondent, Hernandez planned to ask no further questions, but only to counsel Cabrera concerning the proper procedures for requesting and obtaining approval of leave. The fact is that after this question, there was no notice to the employee that it was merely a counseling session or that the examination portion had ended and that a different type of meeting would then begin. Social Security Administration, 19 FLRA No. 93, 19 FLRA 748 (1985); United States Department of Justice, Case No. 8-CA-50155, ALJDR No. 55 (1984). It is concluded that the entire session took on the character of an examination in connection with an investigation.

Cabrera had a reasonable fear of discipline. He had observed Hernandez looking at his automobile as Hernandez drove by the Union office, and at the time of the examination Cabrera observed that Hernandez spoke in a hostile tone and manner. When Hernandez began the meeting by asking where Cabrera had been, Cabrera could reasonably fear that he was in trouble for going to the Union office, especially since he had said he was going to the Safety Office and going to the Union office was not a part of his normal work activities. The employee's fear that the meeting could result in some form of discipline was confirmed when he told Hernandez that he needed representation if Hernandez wanted to talk about any disciplinary matter, and received no response from Hernandez assuring him that the matter would not be discussed further or that his statements would not lead to disciplinary action. Social Security Administration, supra. The fact that discipline did in fact result, citing Cabrera's unauthorized trip to the Union office, establishes that the employee's fear of discipline was well founded. Thus, it is clear that in the circumstances of this case, Cabrera's fear of discipline meets the objective standard of reasonableness enunciated by the Authority. Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA 237 (1980); Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA 473 (1981).

Respondent does not dispute that Cabrera's request for representation was sufficient to put Hernandez on notice that he was invoking his section 7114(a)(2)(B) right to union representation. Consequently, it is concluded that Respondent's failure to provide an opportunity for the exclusive representative to be represented at the examination constituted a failure to comply with section 7114(a)(2)(B) and a violation of section 7116(a)(1) and (8), as alleged. Since, by Hernandez' own admission, he would not have initiated the charge of AWOL or any disciplinary action if Cabrera had not refused to meet with him on May 6, 1985, the disciplinary action was closely related to Cabrera's insistence on his section 7114(a)(2)(B) rights and also constitutes a violation of section 7116(a)(1) for interference with rights protected by the Statute and a violation of section 7116(a)(2) for discrimination because of protected activity, as alleged. Department of the Navy, Norfolk Naval Base, 14 FLRA 731 (1984).

III. Case No. 2-CA-50356

A. Statement of the Case

The complaint in Case No. 2-CA-50356 alleged, in substance, that the Respondent violated Section 7116(a)(1) and (5) of the Statute when it changed the past practices and procedures for requesting and approving sick leave and annual leave for employees without first providing the Charging Party notice and an opportunity to bargain over the impact and implementation of the change. The Respondent admitted the jurisdictional allegations as to the Union, the Respondent, and the charge, but denied any violation of the Statute.

B. Findings of Fact

On January 4, 1985 Sergio Hernandez, Chief of the Operations and Maintenance Division, issued a Disposition Form (memorandum) to all division personnel which was posted on division bulletin boards. The memorandum set forth procedures to be used by employees for requesting emergency annual or sick leave. The memorandum was consistent with Army regulations and Fort McPherson regulations, both of which are binding on the Respondent. The memorandum provided, in pertinent part, as follows:

> 1. Employees absent on account of illness or some emergency reason for which absence on annual or sick leave could not be requested in advance are responsible to notify their supervisor as early as practicable on the first day of absence, generally within two (2) hours of the beginning of the tour of duty.
>
> 2. Annual leave is provided and used for two general purposes:
>
> > A) to allow every employee an annual vacation period of extended leave for rest and recuperation.
> >
> > B) to provide periods of time off for personal and emergency situations.
>
> 3. Although annual leave is a right of an employee in that its accrual may not be denied, it is the prerogative of management to make the final decision on when leave is to be used. For this reason, the use of annual leave is subject to the prior approval of the appropriate supervisor. Retroactive approval may be given where circumstances warrant. It must not be assumed, however, that a mere report of absence will necessarily result in favorable action. Failure to secure the proper approval may result in the period being charged to absence without leave.
>
> 4. Requests for sick leave for medical, dental or optical examination or treatment should be made prior to the beginning of the absence.

> 5. Your supervisor is the approval authority to grant periods of leave charged to annual and/or sick. Calling in and notifying a fellow employee that you are not coming to work is no approval. You must obtain approval from your immediate supervisor. Failure to do so may result in a charge to absence without leave.

On May 2, 1985, Mr. Hernandez issued another Disposition Form (memorandum) to all division personnel which was likewise posted on division bulletin boards. The memorandum also dealt with the procedures to be used by employees in requesting emergency annual or sick leave. Mr. Hernandez was aware that two of his supervisors were often out of the office. Therefore, employees would often be unable to reach the supervisors to obtain approval for leave. He designated the division administrative office with three telephone extensions as the central location where employees could call in order to request leave. He also required that employees leave a telephone number where the supervisor could call back. He anticipated that in this way an employee would not have to keep calling, in some cases on a long distance basis, in an effort to reach the supervisor. The May 2, 1985 memorandum provided, in part, as follows:

> Due to the fact that supervisors are not 100% of their time at the office, there may be situations where an employee calls in to request annual/sick leave due to an unexpected personal emergency/illness and is unable to communicate with his supervisor.
>
> To help employees with this situation and assure approval for annual/sick leave is properly obtained, effective immediately all O&M personnel requesting unscheduled annual/sick leave will call the Operations & Maintenance Division Administrative office Exh 3214, 8176 & 8261. Secretary will locate particular supervisor, if not within reach, employee will leave a phone number where supervisor can call later to verify request and approve/disapprove request.
>
> It is reminded that your supervisor is the only one who authorizes leave. By calling in and leaving a message that you are unable to come to work does not constitute approval.

Failure to obtain approval may result in charge to absent without leave (AWOL).

The procedures set forth in the May 2, 1985 memorandum constituted a change in the past practice and procedures for requesting and approving sick leave and emergency annual leave. Prior to issuance of the May 2, 1985 memorandum, employees who telephoned and left a message with a secretary or co-worker to report absence and request leave were not required to leave a telephone number where the supervisor could later reach the employee in order to verify the request and approve or disapprove the leave. Prior to the memorandum, if an employee were unable to telephone, he could request leave by sending a message to his supervisor by way of a co-worker, or, if unable to telephone or send a message, he could explain the reasons for his absence and attempt to secure approval for the leave when he returned to work. The January 4, 1985 memorandum, regulations, and the past practice made clear that retroactive approval could be given where the circumstances warranted. The May 2, 1985 memorandum did not specifically refer to the procedure for obtaining retroactive approval and, by requiring a telephone number for the supervisors to call back to verify the request, created the impression that if the supervisor were unable to return the telephone call and immediately approve the leave, the person could be declared absent without leave. (Tr. 29).

The change in the procedures for requesting emergency leave set out in Hernandez' memorandum of May 2, 1985 had a foreseeable adverse impact on employees. The greatest adverse impact would fall on employees who have no telephone at their homes and are accustomed to requesting emergency leave by using a public pay telephone, sending a message by a co-worker, or explaining their absence and attempting to receive approval of leave upon their return to duty. Some employees live in an area that is twenty to thirty minutes by car from the nearest telephone. In addition, in an emergency, such as an accident, an employee might be unable to leave a telephone number where the supervisor could call back to verify the request and approve or disapprove the leave.

Since May 2, 1985, the requirement that employees who are unable to reach their supervisors must leave a telephone number in order to have their request verified and leave approved has, for the most part, been unenforced. Some employees have continued to leave messages requesting leave with other employees when their supervisors were unavailable, and the leave has not been disapproved. Even so, the Respondent has not withdrawn the May 2, 1985 memorandum or informed employees that it may be disregarded and, as detailed below, it was enforced in the case of Ramon E. Cabrera-Vega. Employees are concerned that the memorandum may be enforced in the future.

On August 5, 1985 at approximately 10:40 a.m., Mr. Ramon E. Cabrera-Vega left a message for his supervisor, Sergio Hernandez, with Mrs. Iris Tiller, a utilities clerk, that he had to immediately attend a training session and was requesting annual leave. Mr. Cabrera's supervisor, Mr. Hernandez, was not in the office. Subsequently, Mr. Cabrera was charged four hours absence without leave (AWOL) for the time he was away from work on this occasion and, in addition, was suspended for three days for this and an unrelated absence on August 6, 1985. The disciplinary action of November 1, 1985 was based, in part, on Cabrera's action in reporting an absence to a co-worker rather than requesting leave from his supervisor (failure to follow procedures for requesting and obtaining approval of leave) and on the determination that his reasons for requesting leave on August 5, 1985 were not of an emergency nature such as would have precluded him from following the usual procedures for requesting leave in advance. It was stated that the past disciplinary action of August 21, 1985 (discussed in Case No. 2-CA-50355) had been considered, and the penalty was one consistent with a second offense.

C. Discussion, Conclusions, and Recommendations

The General Counsel contends that Respondent's action on May 2, 1985 constituted a change in the practices and procedures for requesting and approving sick leave and emergency annual leave by requiring employees to furnish a telephone number so that the supervisor could contact the employees to approve the leave and by subjecting employees who merely left messages with co-workers to being AWOL. The General Counsel claims that the change was negotiable as to substance, and it is not necessary to look to the impact of the decision on unit employees. Assuming a showing of more than *de minimis* impact is necessary, the General Counsel argues that such an impact was reasonably foreseeable here.

Respondent defends on the basis that the only change made by the May 2, 1985 memorandum was the setting out of specific numbers for employees to call and the establishmen of the telephone call-back procedure. Respondent contends that the requirement for the supervisor's approval, which may be given retroactively, is a long standing one. Respondent maintains that the limited change made was a *de minimis* one designed to benefit employees.

The record establishes that the May 2, 1985 memorandum did not change the long-standing requirement that supervisory *approval* for periods of annual or sick leave is required. It was the practice that although a request for leave could be approved retroactively where circumstances warranted, an employee who failed to secure prior supervisory approval in advance always acted at his peril.

However, the memorandum did change an established condition of employment concerning the method of *requesting* leave. The changes in established conditions of employment made by the May 2, 1985 memorandum were the setting out of specific telephone numbers at a central location for employees to call to request sick leave or emergency annual leave and the establishment of the requirement that employees must request leave by reporting a telephone number where supervisors could call back to verify the request and approve or disapprove the leave. The memorandum gave the clear impression that failure to leave a number for call-back purposes *could* result in the disapproval of leave and that other previous methods of sending a message to the supervisor for purposes of requesting leave and seeking retroactive approval would no longer be allowed.

The Authority has held that an agency is obligated to notify the exclusive representative of its employees and bargain over the change when it intends to make a change in working conditions such as procedures used in connection with the use of leave. *Department of Health and Human Services, Office of the Secretary, Headquarters*, 20 FLRA No. 22, 20 FLRA 175 (1985); *U.S. Department of Interior, Bureau of Reclamation*, 20 FLRA No. 72, 20 FLRA 587, 601 (1985); *Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado*, 10 FLRA 235 (1982). Here the change at issue--call in procedures--is clearly a matter that is negotiable in substance. *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 14 FLRA 475 (1984). Where, as here, the decision to make a change was itself negotiable, it is not necessary to look to the impact of the decision on unit employees to conclude that a bargaining obligation exists when such working condition are changed. *U.S. Department of Interior*, *supra*; *Department of Health and Human Services*, *supra*; *U.S. Army Reserve Components Personnel and Administrative Center, St. Louis, Missouri*, 19

FLRA No. 40, 19 FLRA 290, 292-293 (1985). By changing the practices and procedures for requesting sick leave and emergency annual leave without giving the Charging Party notice and an opportunity to bargain, Respondent failed to satisfy its statutory bargaining obligation. The General Counsel alleged only a failure to bargain on impact and implementation. Respondent's failure to do so as part of its statutory obligation violated section 7116(a)(1) and (5) of the Statute, as alleged.

The General Counsel seeks rescission of the requirements set forth in the May 2, 1985 memorandum and removal and reconsideration of any disciplinary action based thereon, including the AWOL and suspension action in the case of employee Cabrera-Vega. Respondent claims that the evidence relating to Mr. Cabrera's absences is irrelevant since the instance in question involved an employee leaving work rather than failing to report, and it did not involve a failure to leave a telephone number.

I agree with the General Counsel that a *status quo ante* remedy is required, upon request of the Charging Party. The disciplinary action concerning Mr. Cabrera is not irrelevant as the May 2, 1985 memorandum addresses procedures for requesting unscheduled sick or annual leave which Mr. Cabrera was charged with violating. The memorandum is not specifically restricted to situations involving employees requesting such leave before arriving at work at the beginning of the work day. The disciplinary action was based, in part, on Cabrera's action in leaving a message for his supervisor with a co-worker rather than requesting leave directly from his supervisor (failure to follow procedures for requesting and obtaining approval of leave). Although supervisory *approval* of leave has always been required, Mr. Cabrera's action in *requesting* leave, by leaving a message with a co-worker, was consistent with Respondent's past practice and procedure prior to May 2, 1985. There was no specific charge of insubordination. See *Veterans Administration, West Los Angeles Center*, 23 FLRA No. 37 (1986). Thus, Respondent may not rely on the manner of the request in imposing discipline, but, may, upon reconsideration, rely upon its determination that the reason for the employee's request did not qualify for approval of emergency annual leave under existing rules and regulations. Accordingly, it will be recommended, *inter alia*, that the disciplinary action be reconsidered without reference to the charge of failure to follow procedures for requesting leave. With respect to imposing progressive discipline, the disciplinary action must also be considered without reference to the May 6, 1985 protected activity as discussed above in Case No. 2-CA-50355.

IV. Case No. 2-CA-50487

A. Statement of the Case

The complaint in Case No. 2-CA-50487 alleged that Respondent violated section 7116(a)(1) of the Statute when on September 4, 1985 Respondent, by its agent Conrad Spencer Johnson, told a bargaining unit employee that, inter alia, if the employee did not withdraw the charges in certain complaints issued by the Federal Labor Relations Authority, the employee would be sorry. The complaint also alleged that Respondent violated section 7116(a)(1) and (2) of the Statute when Respondent issued a five day proposed suspension to Roman E. Cabrera-Vega on Septembe- 5, 1985 and on November 21, 1985 when Respondent issued a decision to suspend the employee for three days in retaliation for the employee's protected activity. The Respondent's answer denied the substantive allegations of the complaint.

B. Findings of Fact

Ismael Rivera, national representative of AFGE, AFL-CIO, testified that he met with Conrad Spencer Johnson, civilian personnel liaison officer, Sergio Hernandez, division chief, and employee Ramon Cabrera Vega at the Union office on September 4, 1985 to discuss the possible settlement of unfair labor practice cases. Rivera testified that at this meeting Johnson became irate when Cabrera rejected a settlement offer concerning the unfair labor practice charges. According to Rivera, Johnson said, "Cabrera already has one suspension, if he gets another one we're going to put him outside the gate." Rivera also testified that as Johnson left the meeting in ill humor he told Cabrera, "Think this over well because later on you may regret it."

Ramon Cabrera testified that he did not remember all the conversation between Rivera and Johnson because the two were speaking in English after labor management problems were discussed as scheduled. He communicates better in Spanish and was a bit nervous. He recalled that Johnson was speaking in a high tone of voice and that he was asked by Rivera whether he wanted to withdraw the ULPs. He replied that he did not. He testified that after the meeting Rivera told him that Johnson had said they may take disciplinary action against him it he did not withdraw the cases.

Conrad Spencer Johnson, civilian personnel liaison officer, and Sergio Hernandez, division chief, testified that the September 4, 1985 was held to discuss labor management matters as requested in a letter from Mr. Cabrera of August 29, 1985. Johnson and Hernandez testified that the labor management matters set forth in the August 29 letter were discussed as well as a matter dealing with a detail at the commissary. Johnson and Hernandez testified that the unfair labor practice charges were not discussed at all, and no threats of any kind were made. Johnson testified that although he had Cabrera's proposed discipline in hand, as prepared by Fort McPherson, he did not serve it until September 5, 1985 because he did not want to chill the atmosphere of the September 4, 1985 meeting. Johnson testified that he did have an earlier meeting with Rivera and Cabrera on August 12, 1985 during which settlement of the unfair labor practice charges which had been filed was discussed without incident.

I credit the testimony of Respondent's witnesses in this regard, particularly that of Conrad Spencer Johnson. I found his testimony to be forthright, logical, and convincing.

C. Discussion, Conclusions and Recommendations

Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Based on the credibility resolutions made above, it is concluded that the alleged statements were not made, and that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1), in this respect as alleged. The facts and conclusions with regard to the September 5, 1985 proposed suspension and the November 1, 1985 decision to suspend are discussed in connection with Case Nos. 2-CA-50355 and 50356.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Army, Headquarters, Fort Buchanan, Fort Buchanan, Puerto Rico shall:

1. Cease and desist from:

(a) Unilaterally changing past practices and procedures for requesting sick leave and annual leave of employees exclusively represented by the American Federation of Government Employees, Local 2614 (the Union) without first notifying the Union and bargaining, upon request, to the extent consonant with law and regulation concerning the decision to effectuate such change and its impact and implementation.

(b) Requiring any bargaining unit employee to take part in an examination in connection with an investigation (investigatory interview) or conducting such an examination or interview, without representation by the employee's exclusive bargaining representative if such representation has been requested by the employee, and if the employee reasonably believes that the examination or investigatory interview may result in disciplinary action against such employee.

(c) Discriminating against Ramon E. Cabrera-Vega, or any other bargaining unit employee, because the employee requests representation by the employee's exclusive bargaining representative at an examination in connection with an investigation (investigatory interview) and reasonably believes that the examination or investigatory interview may result in disciplinary action against such employee.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request of the American Federation of Government Employees, Local 2614, rescind the Disposition Form of May 2, 1985, subject, "Requesting Emergency Annual/Sick Leave."

(b) Notify the American Federation of Government Employees, Local 2614 of any contemplated change in the past practices and procedures for requesting sick leave and annual leave as they apply to unit employees exclusively represented by the Union and, upon request, bargain with the Union concerning the decision to effectuate any such change and its impact and implementation to the extent consonant with law and regulation.

(c) Reconsider any disciplinary action based in whole or in part on a failure to comply with the procedures set forth in the May 2, 1985 Disposition Form, including that of Roman E. Cabrera-Vega; remove all references to Mr. Ramon E. Cabrera-Vega's alleged action on August 5, 1985 in failing to follow procedures for requesting leave from his personnel file, including the September 5, 1985 notice of proposed suspension and the November 1, 1985 suspension; reconsider the August 5, 1985 charge of absence without approved leave and the November 1, 1985 suspension of Ramon E. Cabrera-Vega without reference to the alleged failure to follow procedures for requesting leave and without reference to his May 6, 1985 protected activity; take appropriate action as required by law and regulation; and advise Mr. Cabrera-Vega and any other personnel affected by such actions in writing of the actions taken.

(d) Expunge from Ramon E. Cabrera-Vega's official personnel folder, and any other documents or reports, the proposed suspension, suspension, letter of reprimand, and AWOL charges which arose out of the May 6, 1985 meeting between Sergio Hernandez and Ramon E. Cabrera-Vega.

(e) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the

Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding officer shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(f) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the allegations in Case No. 2-CA-50487 that Respondent, by Conrad Spencer Johnson, made certain statements to an employee violative of the Statute be, and they hereby are, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 24, 1986
Washington D.C.

[2-CA-50355; 2-CA-50356;
2-CA-50487]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change past practices and procedures for requesting sick leave and annual leave of employees exclusively represented by the American Federation of Government Employees, Local 2614 (the Union) without first notifying the Union and bargaining, upon request, to the extent consonant with law and regulation concerning the decision to effectuate such change and its impact and implementation.

WE WILL NOT require any bargaining unit employee to take part in an examination in connection with an investigation (investigatory interview) or conduct such an examination or interview, without representation by the employee's exclusive bargaining representative if such representation has been requested by the employee, and if the employee reasonably believes that the examination or investigatory interview may result in disciplinary action against such employee.

WE WILL NOT discriminate against Ramon E. Cabrera-Vega, or any other bargaining unit employee, because the employee requests representation by the employee's exclusive bargaining representative at an examination in connection with an investigation (investigatory interview) and reasonably believes that the examination or investigatory interview may result in disciplinary action against such employee.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, of the American Federation of Government Employees, Local 2614, rescind the Disposition Form of May 2, 1985, subject, "Requesting Emergency Annual/Sick Leave."

WE WILL notify the American Federation of Government Employees, Local 2614 of any contemplated change in the past practices and procedures for requesting sick leave and annual leave as they apply to unit employees exclusively represented by the Union and, upon request, bargain to the extent consonant with law and regulation with the Union concerning the decision to effectuate any such change and its impact and implementation.

WE WILL reconsider any disciplinary action based in whole or in part on a failure to comply with the procedures set forth in the May 2, 1985 Disposition Form, including that of Ramon E. Cabrera-Vega; remove all references to Mr. Ramon E. Cabrera-Vega's alleged action on August 5, 1985 in failing to follow procedures for requesting leave from his personnel file, including the September 5, 1985 notice of proposed suspension and the November 1, 1985 suspension; reconsider the August 5, 1985 charge of absence without approved leave and the November 1, 1985 suspension of Ramon E. Cabrera-Vega without reference to the alleged failure to follow procedures for requesting leave and without reference to his May 6, 1985 protected activity; take appropriate action as required by law and regulation; and advise Mr. Cabrera-Vega and any other personnel affected by such actions in writing of the actions taken.

WE WILL expunge from Ramon E. Cabrera-Vega's official personnel folder, and any other documents or reports, the proposed suspension, suspension, letter of reprimand, and AWOL charges which arose out of the May 6, 1985 meeting between Sergio Hernandez and Ramon E. Cabrera-Vega.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 3700, New York, NY 10278, and whose telephone number is: (212) 264-4934.

[6-CO-60003;
6-CO-60014]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1920, AFL-CIO,
FORT HOOD, TEXAS

Respondent

and

Case Nos. 6-CO-60003,
6-CO-60014

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENTS OF THE ARMY AND
AIR FORCE, ARMY AND AIR
FORCE EXCHANGE SERVICE,
DALLAS, TEXAS

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 30, 1987, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., March 13, 1987.

Harold D. Kessler
Director of Case Management

[6-CO-60003;
6-CO-60014]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1920, AFL-CIO,
FORT HOOD, TEXAS

Respondent

and

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENTS OF THE ARMY AND
AIR FORCE, ARMY AND AIR
FORCE EXCHANGE SERVICE,
DALLAS, TEXAS

Charging Party

. . . .

Case Nos. 6-CO-60003
6-CO-60014

Glen J. Peterson
For the Respondent

Donald L. Streeter
For the Charging Party

Christopher J. Ivits
For the General Counsel

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This matter arises under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et. seq. It is based on a charge filed by the Army and Air Force Exchange Service, Dallas, Texas on October 25, 1985, and a Complaint issued on January 28, 1986 by the Regional Director of Region VI of the Federal Labor Relations Authority. The Complaint alleged that Respondent violated Section 7116(b)(8) of the Statute by refusing the agency's request to submit a grievance to arbitration.

A hearing was held on April 23, 1986, in Temple, Texas. Based upon the entire record, and my observation of the witnesses, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO has been the exclusive representative of a worldwide consolidated unit of civilian employees of the Army and Air Force Exchange Service since November 13, 1981. Respondent Local 1920 is the representative of AFGE at the Fort Hood Exchange of AAFES for purposes of collective bargaining, employee representation and contract administration.

Negotiations between AAFES and AFGE have been underway since 1981 but have not yet produced a contract. However, Respondent and the Fort Hood Exchange are parties to a contract which became effective on January 15, 1981.

On June 5, 1985, Exchange Manager Miller filed a grievance with Respondent's President Stimmel. He complained that Respondent's Vice President Myers "repudiated" the contract by taking a safety and health complaint that was then before his office and elevating it to the attention of a representative of the Commanding General of AAFES. In essence, Miller seems to have complained that the grievance procedure was circumvented by bringing the matter to the attention of the General's office.

On July 9 Stimmel replied, rejecting the grievance as false. He explained that Vice President Myers was confronted with a serious threat to the health and safety of employees and was forced by Miller's unavailability and that of his assistant to take the step she took.

On July 25 Miller replied to Stimmel, asserting that the latter's letter simply confirmed the conduct of which he grieved: the Local had reiterated its view that it was free to ignore the contract's grievance resolution procedures and go outside (or over) local management. He then requested arbitration pursuant to Article XXXVI, asking the Union to join him in requesting from FMCS a list of seven arbitrators pursuant to Section 2.

On August 19, Miller again wrote Stimmel, stating that he had that day requested a FMCS list, and that he took Stimmel's failure to respond as a refusal to honor Section 2.

On September 3 AAFES Labor Relations Chief Streeter wrote Stimmel, requesting that he attend a meeting on September 6 for the purpose of striking arbitrators and stating management's intention to proceed *ex parte* to arbitration should the Union refuse to participate. Streeter again wrote Stimmel on September 12, after the Union failed to show, suggesting another meeting on September 24, and restating management's intention, if necessary, to go it alone (and, perhaps, to file an unfair labor practice).

On October 4, Miller again wrote Stimmel and requested that Stimmel contact him on or before October 15 for the purpose of meeting to strike arbitrators.

On October 15, Stimmel wrote Exchange Manager Miller, again rejecting his grievance, and asserting in essence that the Union's effort to secure relief from "faulty" working conditions was not contractually confined to the grievance procedure. To the contrary, he said, the grievance procedure was not a gag order, and the Union remained free to discuss its concerns over working conditions with "whomever we choose."

On January 10 the Exchange notified the arbitrator of his *ex parte* selection, and promised to pay all costs if the Union failed to appear. Stimmel wrote the arbitrator on January 24, asserting that the Union would attend to present its position that the matter was neither grievable nor arbitrable, but would not pay any part of his fees. Later, the Exchange put the matter on hold pending resolution of the instant case.

Discussion and Conclusions

General Counsel contends that Respondent failed to comply with Section 7121 by refusing to follow through in the arbitral process designed to resolve the grievance. This consisted of three discrete matters: The failure to join in the request to FMCS for a list of arbitrators; the failure to attend the meeting at which the parties were to "strike" names off that list until one remained and was thereby chosen; and the refusal to be responsible for its share of the costs of arbitration.

Respondent contends that the collective bargaining agreement makes no provision for agency grievances; that the attempt to go to arbitration was in any event ineffective because it had to be made to the National Office of AFGE, which now holds exclusive recognition; that any claimed violation has been mooted by the union's willingness to go to arbitration; and that the grievance concerns an employee outside the bargaining unit.

Section 7121 provides that collective bargaining agreements "shall provide procedures for the settlement of grievances, including questions of arbitrability" . . . and shall provide for binding arbitration of unresolved grievances, "which may be invoked by either the exclusive bargaining agent or the agency." In addition, "grievance" is defined in Section 7103(a)(9)(C) to include a complaint "by any employee, labor organization or agency concerning" a claimed breach of a collective bargaining agreement.

The Authority has applied these rather clear mandates to hold that both parties must have access to the grievance and arbitration procedures, and that the failure to participate in any necessary step in the procedure constitutes noncompliance with Section 7121 and a violation of Section 7116(a)(1) and (8).[1/]

Thus all Respondent's defenses, except the claim of mootness, are no more than assertions that the matter is not arbitrable. As noted, the statute requires procedures for the settlement of grievances, including questions of arbitrability. Such arguments therefore must be addressed to the arbitrator. "(A)ll questions of arbitrability must be submitted to an Arbitrator." Department of the Navy, Portsmouth Naval Shipyard, 11 FLRA 456, 457.[2/] The claim of mootness is misplaced, notwithstanding Respondent's professed willingness to "participate" in arbitration, for it remains unwilling to share the costs of that process. Such nonpayment is a refusal to take the action required by Section 7121. Department of Labor, supra at footnote 5.

[1/] See e.g. Department of Labor, Employment Standards Administration, 10 FLRA 316; AFGE Local 2782, AFL-CIO and Department of Commerce, Bureau of Census, 21 FLRA No. 45.

[2/] This statement is in fact too sweeping. Where it is clearly well established that the subject matter of a grievance is excluded by law from the coverage of all grievance procedures negotiated pursuant to Section 7121, the refusal to submit such question to an arbitrator is not violative of Section 7116(a)(1) and (8). Director of Administration Headquarters, U.S. Air Force, 17 FLRA 372 (refusal to process grievance over termination of probationary employee).

General Counsel moved for Summary Judgement, and it would have been granted without further ado, but for the undersigned's determination to make every effort to ensure that Respondent's agents fully understood the requirements of the law, and had every opportunity to assert such defenses as they thought merited my attention. Respondent's brief argues at some length that the Agency here agreed to a grievance/arbitration procedure which does not provide access to the agency, apparently by failing to protest the continuation or renewal of an earlier contract which lawfully failed to provide such a right. Without intending to usurp the arbitrator's function, and without attempting to interpret the parties' agreement, it is worth noting that the Statute, unlike the Executive Order, mandates agency access to negotiated grievance and arbitration procedures. Laborer's International Union of N.A., AFL-CIO, Local 1267 and Defense Logistics Agency, Tracy, California, 14 FLRA 686, 696. This rule does not apply in situations where parties to a contract which predates the Statute, and which did not provide for agency access, mutually agree after the effective date of the Statute to renew or continue the agreement in that respect. V.A. Audie Murphy Memorial Veterans Hospital, 15 FLRA 591. But it does apply where the Agency objects to continuation of the contract provision which bars the otherwise mandated access. VA Data Processing Center, Hines, Illinois, 15 FLRA 894. The question whether the parties here have mutually agreed to continue a preexisting exclusion of management from the process is for the arbitrator and not for me. U.S. Customs Service, Region VII, 10 FLRA 251.

In sum, Respondent has raised no argument and cited no case, indicating that this case involves a grievance not cognizable under law, i.e. that it presents issues over which an arbitrator lacks subject matter jurisdiction. Absent clear holdings that a matter cannot be subject to resolution pursuant to grievance/arbitration procedures, as is the case, for example, with probationary employees, all such disputes must, in the first instance, be placed before the arbitrator.

It follows that Respondent, by refusing to proceed to, and participate in, arbitration, has failed to comply with Section 7121 and thereby violated Section 7116(a)(1) and (8). That failure consists of the refusal to participate in each step of the mechanism the parties had agreed upon: the request for and selection of an arbitrator and the sharing of the costs.

I recommend, accordingly, that the Authority enter the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the American Federation of Government Employees, Local 1920, AFL-CIO, shall:

1. Cease and desist from:

(a) Refusing to proceed to arbitration or otherwise failing fully to participate in such procedures, including their costs, regarding a grievance filed by the Fort Hood Exchange, Army and Air Exchange Service, on June 5, 1985, contrary to the requirements of section 7121 of the Federal Service Labor-Management Relations Statute.

(b) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, proceed to arbitration regarding such grievance and pay its share of arbitration costs.

(b) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Fort Hood Exchange, Army and Air Force Exchange Service are customarily posted, copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, Local 1920, AFL-CIO, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to members and other employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notices to the Fort Hood Exchange Manager, for posting in conspicuous places where the unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge

Dated: January 30, 1987
Washington, D.C.

[6-CO-60003;
6-CO-60014]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to proceed to arbitration, or otherwise fail fully to participate such procedures, including their costs, regarding the grievance filed by the Fort Hood Exchange, Army and Air Exchange Service, on June 5, 1985, contrary to the requirements of section 7121 of the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, proceed to arbitration regarding such grievance, and pay our share of arbitration costs.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.

[6-CO-40016]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3320

Respondent

Case No. 6-CO-40016

and

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, REGION VI, AND
UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, REGION VI
SAN ANTONIO AREA OFFICE

Charging Party

ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding on January 29, 1987, recommending that the Respondent Union's application for attorneys fees be dismissed as it had not been timely filed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1986)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the application for attorneys fees is hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 19, 1987.

Jacqueline R. Bradley for
Harold D. Kessler
Director of Case Management

[6-CO-40016]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO
LOCAL 3320

Respondent

and

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,
REGION VI, AND UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, REGION VI,
SAN ANTONIO AREA OFFICE

Charging Party

Case No.: 6-CO-40016

Steven M. Angel, Esquire
For the Charging Party

William Cregar, Esquire
Donald Grant, Esquire
For the Respondent

James W. Mast, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION ON APPLICATION FOR ATTORNEY'S FEES

Statement of the Case

This case involves an application for attorney's fees and expenses filed on September 11, 1986, by American Federation of Government Employees, AFL-CIO, Local 3320 (hereinafter referred to as the "Union"), pursuant to Equal Access to Justice Act, 5 U.S.C. §504, and §2430.1, et seq., of the Authority's Rules and Regulations, by virtue of the fact that Respondent was the prevailing party in the Decision and Order issued by the Authority herein on August 11, 1986, 23 FLRA No. 5, 23 FLRA 20. The application seeks a fee for legal services rendered by Steven M. Angel, Esquire, in the amount of $731.25 (9.75 hours @ $75.00 per hour) and the cost of transcript in the amount of $88.00. Respondent filed with its application a Motion for Leave to Supplement Application to submit, ". . . appropriate Labor Management Reports . . ." which Respondent (Applicant), "must obtain. . . ." (Motion For Leave to Supplement Application For Attorneys Fees). By Notice and Order dated September 30, 1986, Respondent's (Applicant's) Motion for additional time to supplement Application was granted, said time to run from September 12, 1986, the date the Application and Motion was received by the Office of Administrative Law Judges, i.e., Respondent's time to supplement application was extended to October 14, 1986; the time for the General Counsel to respond, pursuant to §2430.9 of the Regulations, was extended to November 13, 1986; the time for any party other than Respondent and the General Counsel to file comments, pursuant to §2430.9(e) of the Regulations, was extended to November 13, 1986; and Respondent was given leave to reply to any timely response by not later than November 27, 1986.

Respondent did not supplement its application by October 14, 1986, nor did Respondent request any additional time within which to do so. On November 12, 1986, General Counsel timely mailed his Response to Respondent's Application For Attorneys Fees and Motion For Leave To Supplement Application For Attorneys Fees, received on November 13, 1986. General Counsel moved, ". . . the dismissal of the Application For Attorneys Fees and any Supplemental Application, if any there be, for the reason that (1) Respondent has failed to comply with the requirements of the Equal Access to Justice Act and the Authority's Rules, Section 2430.6(a), (b), (e), (f), and (g), and (2) the General Counsel's position in the litigation in question was reasonable both in law and fact and litigation of the case was substantially justified." (General Counsel's Response, p. 10).

By letter dated November 20, 1986, Steven M. Angel, Esquire, attorney for Respondent (Applicant) transmitted Application For Leave To File Affidavit and Affidavit of Kenneth Aquirri, formerly President of American Federation of Government Employees, AFL-CIO, Local 3320, which were received on November 24, 1986.

On November 25, 1986, I issued an Order To Show Cause which provided, in part, as follows:

"As set forth in the Notice and Order on Respondent's Application For Attorneys Fees, dated September 30, 1986, Respondent's application for attorneys fees and motion for leave to supplement application, although transmitted to the Authority by letter dated September 10, 1986, were not received by the Authority, i.e. were not filed with the Authority in Washington, D.C., until September 11, 1986. §2430.7 of the Authority's Rules and Regulations provides, in part, as follows:

> '(a) An application may be filed after entry of the final order establishing that the applicant has prevailed in the proceeding . . . but in no case later than thirty (30) days after the entry of the Authority's final order in the proceeding. . . .' (5 C.F.R. §2430.7) (Emphasis supplied).

"The Authority's final order in this proceeding was issued on August 11, 1986, and thirty days after the entry of the Authority's final order in this proceeding was September 10, 1986. As the Rules and Regulations provide that an application may be filed '. . . in no case later than thirty (30) days after the entry of the Authority's final order. . . .', it does not appear that Respondent's application was timely filed.

"In its Motion For Leave to Supplement Application For Attorneys Fees, Counsel for Respondent represented that 'Applicant will submit appropriate Labor Management Reports and the undersigned must obtain these. Accordingly, the undersigned would request an additional thirty days in which to obtain the appropriate financial statements.' Respondent's motion for additional time to supplement Application was granted, such time to run from September 12, 1986,

> or specifically, to October 14, 1986. Respondent did not respond in any manner until November 20, 1986, received on November 24, 1986, and instead of submitting Labor Management Reports, or otherwise submitting '. . . a detailed exhibit showing the net worth of the applicant when the proceeding was initiated' as required by §2430.6(f) of the Authority's Rules and Regulations (5 C.F.R. §2430.6(f)), tendered the affidavit of Mr. Phillip K. Aguirri, former President of Local 3320, which, even if accepted, is not in compliance with §2430.6(f).
>
> "It is, therefore,
>
> "ORDERED, that the parties shall on, or before, December 15, 1986, show cause as to:
>
>> "A. Why the application should, or should not, be dismissed as untimely filed;
>>
>> "B. Why the Application For Leave to File Affidavit should, or should not, be accepted out of time; and
>>
>> "C. Why the application should, or should not, be dismissed, even if the original application were found to have been timely filed, for failure to comply with §2430.6(f). . . ." (Order To Show Cause, pp. 1-2)

The Order to Show Cause further provided that General Counsel was given leave to respond, on, or before, December 15, 1986, to any response of Respondent as to ". . . the basis of his claim and the arguments and authority in support of such claim" as General Counsel had requested in his Response of November 12, 1986; and finally, that Respondent's time to file a reply to the response of General Counsel, as set forth in the Notice and Order dated September 30, 1986, on, or before, November 27, 1986, was not extended.

Respondent (Applicant) submitted no reply to the response of General Counsel, required to be submitted on, or before November 27, 1986, by the Notice and Order dated September 30, 1986; and Respondent (Applicant) submitted no timely response to the Order To Show Cause, dated November 25, 1986.[1] General Counsel timely mailed a Response to the Order to Show Cause, dated December 12, 1986, and received on December 15, 1986; and the Charging Party, United States Department of Housing and Urban Development, timely mailed a Response to the Order To Show Cause, dated December 15, 1986, and received on December 17, 1986.

Conclusions

A. Application Not Timely Filed.

For reasons set forth hereinafter in more detail, Respondent's Application for Attorneys Fees and Costs was not timely filed and must, for this reason alone, be dismissed.

The Equal Access to Justice Act, 5 U.S.C. §504, which governs the award of attorneys fees and costs, specifically provides, in part, that:

> "(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application. . . ." (5 U.S.C. §504(a)(2)) (Emphasis supplied).

In Monark Boat Company, 262 NLRB 994 (1982), the Board's final order was entered on October 6, 1981. On November 5, 1981, the respondent mailed its application which was received by the Board on November 6, 1981, thirty-one days after the entry of the Board's final order. In dismissing the application, the Board stated, in part, as follows:

> ". . . Under EAJA, a party must submit its application within 30 days of final judgment. The statute makes no mention

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[1] Respondent's (Applicant's) Motion To Withdraw Application, dated January 4, 1987, and received on January 5, 1987, is hereby rejected as untimely filed and has been given no consideration in the disposition of this matter.

> of service. Section 102.14(a) [of the Board's Rules and Regulations[2]] is triggered only when a party's action must take place within a certain period 'after service.' Thus, here, since it is the entry of the Board's final order that marks the beginning of the filing period, rather than service of notice of final judgment, Section 102,114(a) is immaterial.
>
> "In sum, we find that the 30-day filing period is a jurisdictional prerequisite to application under EAJA. Because it is jurisdictional, we cannot legally extend the filing period beyond 30 days. Consequently, where an application fails to comply with the specified jurisdictional time period, this Agency is without jurisdiction to pass upon the merits of the application. Here, Respondent's application having been filed on the 31st day after final judgment, we are therefore compelled to dismiss said application for lack of jurisdiction." (262 NLRB at 995).

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[2] ". . . Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served on him by mail or by telegraph, 3 days shall be added to the prescribed period. . . ." (Section 102.114(a)).

This is substantially like §2429.22 of the Authority's Rules and Regulations, which provides, in material part, as follows:

> ". . . whenever a party has the right or is required to do some act pursuant to this subchapter within a prescribed period after service of a notice or other paper upon such party, and the notice or paper is served on such party by mail, five (5) days shall be added to the prescribed period. . . ." (5 C.F.R. §2429.22).

The decision of the Board was affirmed by the Eighth Circuit Court of Appeals, 708 F.2d 1322 (8th Cir. 1983). In its decision, the Court stated, in part, as follows:

> ". . . Accordingly, as the Board concluded, when applying time limitations contained in statutes waiving sovereign immunity, strict compliance not substantial compliance is required." (708 F.2nd at 1329).

In Columbia Manufacturing Company, 265 NLRB 109 (1982), an Administrative Law Judge issued his order dismissing the complaint on October 21, 1981, and that order became the final disposition of the case as no party filed a request for review. The application for attorneys fees and costs was filed with the Board on November 23, 1981, thirty-three days after the final disposition of the case. The Administrative Law Judge held that Section 102.114(a), supra, n.2, was applicable because his order had been mailed; that the application had, therefore, been timely filed; and granted attorneys fees and expenses in the amount of $17,774.05. The Board reversed and dismissed the application, stating, in part, as follows:

> ". . . The question of 'final disposition' is governed by Section 102.27.[3] As the last sentence in that section makes clear, where no party files a request for review of an order of an administrative law judge dismissing a complaint prior to issuance of a decision, the case is considered

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[3] Sec. 102.27 of the Board's Rules and Regulations provides, in material part, as follows:

> "Sec. 102.27 Review of granting of motion to dismiss entire complaint; reopening of record. - If any motion in the nature of a motion to dismiss the complaint in its entirety is granted . . . any party may obtain a review of such action by filing a request therefor with the Board in Washington, D.C. . . . Unless such request for review is filed within 10 days from the date of the order of dismissal, the case is closed."

> closed as of the date of the order of dismissal. [footnote omitted] Here, the Administrative Law Judge issued his order dismissing the complaint on October 21. And, since no party filed a request for review, that order became the final disposition of the underlying unfair labor practice case.
>
> "The Applicant's application was filed with the Board on November 23 - 33 days after the final disposition of the case. Thus, the Applicant failed to comply with the jurisdictional time period specified in section 504(a)(2) of EAJA, and we therefore are without authority to pass upon the merits of the application. Monark Boat, supra. Consequently, we are compelled to dismiss the instant application for lack of jurisdiction." (265 NLRB at 109).

The decision of the Board was affirmed by the Ninth Circuit Court of Appeals, 715 F.2d 1409 (9th Cir. 1983). In its decision, the Court stated, in part, as follows:

> "The thirty-day limitation period for submitting fee applications is jurisdictional. Thus, the NLRB's strict construction of the thirty-day time limit was correct.
>
> "Since Columbia did not file its fee application within thirty days of the final disposition of the adversary adjudication, the NLRB correctly concluded that the application was filed untimely." (715 F.2d at 1410).

To like effect, see also, Lord Jim's, 264 NLRB 1098 (1982), review denied, Lord Jim's v. N.L.R.B., 772 F.2d 1446 (9th Cir. 1985).

In Action on Smoking and Health v. Civil Aeronautics Board, 724 F.2d 211 (D.C. Cir. 1984), with respect to the time limit for filing an application pursuant to EAJA, the Court of Appeals for the District of Columbia Circuit stated, in part, as follows:

> "The thirty day time limitation contained in EAJA is not simply a statute of limitations. It is a jurisdictional prerequisite to governmental liability. ASH's failure to file in a timely fashion deprives this court of subject matter jurisdiction to award fees.
>
> "The Equal Access to Justice Act significantly abridged the government's immunity from suits for attorney's fees. [footnote omitted] As a waiver of sovereign immunity, the Act must be strictly construed. Once the government agrees to allow such suit, 'the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit'. [footnote omitted] Courts have consistently held that a statutory time limitation is an integral condition of the sovereign's consent. [footnote omitted] Compliance with that condition is a prerequisite to jurisdiction. [n. 77 citing Monark Boat Co. v. NLRB, 708 F.2d 1322 (8th Cir. 1983), supra]
>
> "The statutory language and legislative history of the Act, although not couched in the language of jurisdiction, indicate that Congress intended the filing deadlines to be enforced strictly. The statute uses the mandatory 'shall'. The House Conference Report accompanying the Act stated that the bill 'requires a party seeking an award of fees and other expenses to submit the application for them within thirty days of final judgment.' [footnote omitted]. . . ." (724 F.2d at 225)

See, also, Clifton v. Heckler, 755 F.2d 1138, 1144-46 (5th Cir. 1985). (Application for attorney's fees in relation t a proceeding before HHS, held barred by failure to file timely).

Part 2430 of the Authority's Rules and Regulations, 5 C.F.R. §2430.1, et seq., governs the award of attorney fees and other expenses pursuant to the Equal Access to

Justice Act. Section 2430.7(a), in recognition of the time limit mandated by §504(a)(2) of the Equal Access to Justice Act, specifically provides, in relevant part, that:

> "(a) An application may be filed after entry of the final order establishing that the applicant has prevailed in the proceeding, or in a significant and discrete substantive portion of the proceeding, but in no case later than thirty (30) days after the entry of the Authority's final order in the proceeding. The application for an award shall be filed with the Authority in Washington, D.C. . . . ." (5 C.F.R. §2430.7(a)).

Section 2429.21 of the Authority's Rules and Regulations provides, in relevant part, that:

> ". . . When this subchapter requires the filing of any paper, such document must be received by the Authority or the officer or agent designated to receive such matter before the close of business on the last day of the time limit. . . ."[4] (5 C.F.R. §2429.21).

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[4] I am aware that the Authority on December 22, 1986, F.R. Vol. 51, No. 245, published amendments to 5 C.F.R. Parts 2422, 2423, and 2429 and that §2429.21 will be amended to read, in relevant part, as follows:

> "(b) . . . when this subchapter requires the filing of any paper with the Authority . . . the date of filing shall be determined by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. . . ." (F.R. Vol. 51, No. 245 at p. 45752).

These amendments do not become effective until December 31, 1986; are not retroactive; and do not apply to the filing of the instant application which was, and is, governed by the

(footnote continued)

The Equal Access to Justice Act requires that a party seeking an award of fees and other expenses *shall*, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application. The Courts of Appeal for the D.C. Circuit, the Fifth Circuit, the Eighth Circuit and the Ninth Circuit, which, so far as I am aware, are the only Courts of Appeal that have had occasion to consider the time limitation of §504(a)(2) of the Act, have consistently held that the 30 day time limitation contained in EAJA is a jurisdictional prerequisite to governmental liability. *Monark Boat Co.*, *supra*,; *Columbia Manufacturing Company*, *supra*; *Lord Jim's*, *supra*; *Action on Smoking and Health*, *supra*; *Clifton v. Heckler*, *supra*. It is clear, therefore, that under the EAJA if the application in this case were not filed within the jurisdictional time period specified in section 504(a)(2), the application may not be considered. The Authority's Rules and Regulations provide that an application must be filed ". . . *in no case later than thirty (30) days after the entry of the Authority's final order* in the proceeding. The application . . . shall *be filed with the Authority in Washington, D.C.* . . ." (5 C.F.R. §2430.7(a)) (Emphasis supplied); and the Authority's Rules and Regulations further provide that, ". . . When this subchapter requires the filing of any paper, such document *must be received by the Authority* . . . *before the close of business on the last day of the time limit* . . ." (5 C.F.R. §2429.21). Accordingly, Respondent's Application must, pursuant to §504(a)(2) of the EAJA and

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(footnote 4 continued)

provisions of §2429.21 in effect at the time the application was filed, and as set forth in the text above, *i.e.*, ". . . must be received by the Authority . . . before the close of business on the last day of the time limit. . . ."

Because the issue is not before me and the Authority's amended rule, §2429.21(b) was neither in effect nor applicable to this case, I do not , of course, express any opinion as to whether applications, pursuant to §2430.7, will, on, and after, December 31, 1986, be timely filed if mailed, pursuant to §2429.21(b), "no later than thirty (30) days after the entry of the Authority's final order in the proceeding." (§2430.7); but I am aware of the Court's notation in *Lord Jim's*, *supra*, 772 F.2d at 1449 and its citation of 47 C.F.R. §§1.4(e) and 1.1521 (FCC) and 29 C.F.R. §§2200.8(C) and 2204 (OSHA).

§§2430.7(c) and 2429.21 of the Authority's Rules and Regulations, have been received by the Authority in Washington, D.C. not later than thirty days after the entry of the Authority's final order in the proceeding. The Authority's final order in this proceeding was entered on August 11, 1986, and the application, to be considered, must have been received by the close of business on September 10, 1986. But the instant application was not received by the Authority until September 11, 1986, as shown by: (a) the date stamp on the application; and (b) by the memorandum of Harold D. Kessler, Director of Case Management.[5] As Respondent's Application was not received by the Authority "not later than thirty days after the entry of the Authority's final order in the proceeding", it was not filed within the jurisdictional time period specified in section 504(a)(2) of the EAJA and may not be considered.

B. Failure to Complete Application.

Respondent (Applicant) was given leave to supplement the Application, by submitting appropriate Labor Management Resports, on, or before October 14, 1986. This, Respondent (Applicant) failed to do and made no response until November 20, 1986 (received on November 24, 1986) and asserting "an administrative oversight" requested leave to file an attached affidavit. The asserted justification, "administrative oversight" was insufficient to excuse Respondent's failure to comply with the time set, as requested, within which to supplement the application; and the tendered affidavit was not, in any event, in compliance with §2430.6(f) of the Authority's Rules and Regulations. Both General Counsel and the Charging Party urge that the Application be dismissed for this reason; however, in view of my determination that, because the Application was not filed within the jurisdictional time period specified in section 504(a)(2) of the EAJA, the Application may not be considered, I find it unnecessary to decide whether the Application should be dismissed for failure to timely complete the application in accordance with the Authority's Rules and Regulations.

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[5] Moreover, Respondent (Applicant) failed and refused to timely respond to the Order To Show Cause and has thereby waived any right to controvert the stated date of receipt of the application by the Authority.

C. Position of Agency was Substantially Justified.

General Counsel in his Response To Respondent's Application For Attorneys Fees and Motion For Leave To Supplement Application For Attorneys Fees, inter alia., at pages 3-8, with full recognition that §2430.3 of the Authority's Rules and Regulations places, ". . . The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in initiating the proceeding was reasonable in law and fact", set forth in detail reasons why the complaint was, ". . . substantially justified within the meaning of the EAJA and the Authority's Rules, Part 2430." (Response p. 4). General Counsel's Response was served on Applicant (Respondent) by certified mail, return receipt requested, on November 12, 1986; but Applicant (Respondent) failed and refused to mail a reply, as required by the Notice and Order on Respondent's Application For Attorneys Fees, dated September 30, 1986, on, or before November 27, 1986; nor did Applicant (Respondent) request an extension of time within which to respond. As General Counsel's showing that its position in initiating the proceeding was reasonable in law and fact and that the Complaint was substantially justified was neither challenged nor refuted by Applicant (Respondent), General Counsel has shown wholly adequate grounds from which it could be found that the Complaint was ". . . substantially justified or that special circumstances make an award unjust" as provided in §504(a)(1) of the EAJA and, as provided in §2430.3 of the Authority's Rules and Regulations; however, in view of my finding that the Application was not timely filed and, therefore, that the Application must be dismissed for lack of jurisdiction, it is both unnecessary and improper to decide whether the General Counsel's ". . . position in initiating the proceeding was reasonable in law and fact" (§2430.3) and/or that ". . . the position of the agency was substantially justified or that special circumstances make an award unjust." (5 U.S.C. §504(a)(1).

Having found that the Application For Attorneys Fees was not timely filed, the Application is hereby dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 29, 1987
Washington, D.C.

[8-CA-60122]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION,
WEST LOS ANGELES MEDICAL CENTER,
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 8-CA-60122

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1061, AFL-CIO

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 28, 1987, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a)(1984)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., March 19, 1987.

for Jacqueline R. Bradley
Harold D. Kessler
Director of Case Management

[8-CA-60122]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION,
WEST LOS ANGELES MEDICAL
CENTER, LOS ANGELES,
CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1061, AFL-CIO

Charging Party

Case No. 8-CA-60122

Ruth M. Weil, Esq.,
For the Respondent

John R. Pannozzo, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on April 18, 1986 by the Regional Director for the Federal Labor Relations Authority, Los Angeles, California, a hearing was held before the undersigned on May 16, 1986 at Los Angeles, California.

This case arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based on a charge filed on January 16, 1986 by Amerivan Federation of Government Emoloyees, Local 1061, AFL-CIO (herein called the Union) against Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, (herein called Respondent).

The Complaint alleged, in substance, that on or about January 17, 1986 Respondent unilaterally implemented a District Response Plan at its facility without completing bargaining with the Union concerning the impact and implementation of said plan - all, in violation of Section 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated April 30, 1986, denied the aforesaid allegation as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, including the Stipulation of Facts entered as Joint Exhibit No. 1, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the American Federation of Government Employees, AFL-CIO has been the exclusive representative of a national consolidated unit of the Veterans Administration, Washington, D.C., which includes regular work force nonsupervisory General Schedule, Wage Grade and Canteen employees of Respondent's facility at Los Angeles, California.

2. At all times material herein, the Veterans Administration, Washington, D.C. and American Federation of Government Employees, AFL-CIO, have been and still are parties to a nationwide collective bargaining agreement which covers the unit employees at Respondent's facility.

3. At all times material herein the Union has been the delegated agent of American Federation of Government Employees, AFL-CIO, and authorized to act as the bargaining representative on behalf of Respondent's unit employees.

4. On December 5 and 6, 1985, Respondent and the Union met with an object of proceeding through the Disaster

Response Plan, Center Memorandum 1-00-7 and determine the status of the various provisions.[1]

5. The DRP, as drafted by Respondent, called for the following Engineering Service, inter alia, in the event of Internal Disaster: (a) conduct damage assessment, take necessary action; (b) assign staff to man the elevators, Bldg. 500 (Joint Exhibit No. 2, page 15). "Man" the elevators does not mean to inspect them.

6. At the meeting on December 5, 1985 the parties discussed the contemplated action on DRP with respect to manning the elevators in Bldg. 500. The Union proposed that staff employees be sent to inspect all elevators in the event of a major disaster[2] since no provision was made for said inspection.

7. Record facts show there are 51 elevators at the facility which are located in 24 different buildings. The elevators are serviced by two mechanics. If disaster occurred during non-normal duty time, Respondent would not have staff available to check elevators. Moreover, if wide damage occurred due to a disaster, repair work would probably be contracted outside. The DRP proposes to man only Building 500 because that structure could withstand an earthquake. As the heart of the medical center, its elevators could transport patients, materials and people. No provision is made in the DRP for inspecting the elevators in Building 500 or in any other of the 23 buildings.

8. At the December 5, 1985 meeting the Union also proposed that all top management people carry hand held walkie-talkies in the event of disaster.[3] It was

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[1] The Disaster Response Plan (DRP) was devised to establish procedures for emergency care arising from national disaster, enemy attack, or civil disturbance at Respondent's facility or in the surrounding community. (Joint Exhibit No. 2).

[2] There was some discussion as to assessing damages in the event of a disaster, including the posting of hazardous areas to prevent entrance thereto by employees. This topic, however, does not relate to the assignment of staff to inspect the elevators for safety.

[3] This topic was raised in connection with the Communication officer's responsibility, during an internal disaster, to maintain communication as set forth in the DRP. (Joint Exhibit No. 4, page 10).

proposed so that management officials would communicate with each other in the event that telephones were not working or cars could not move on the roads. The use of walkie-talkies could aid in determining who is alive, where individuals are located, and how to get necessaries to them.

9. Record facts show there are 42 walkie-talkies at the facility and all are in use, of which the Police officers use 24; the Medical Center Director and his assistants use 3; and 15 are used by the Engineering Service. Management considered that no additional walkie-talkies were needed. At no time did the Union propose that Respondent purchase additional walkie-talkies.

10. On December 16, 1985 the parties met and a review of the first three sessions was completed for typing. The parties agreed to recess and reconvene on January 6, 1986. It was also agreed that the Union would deliver impact and implementation written counterproposals to DRP by January 2, 1986, or before, to expedite negotiations of DRP.

11. On December 31, 1985 the Union delivered its written counterproposals to Respondent.

12. In a letter dated January 3, 1986,[4] which was received by the Union on January 6, 1986, Respondent stated it found the Union's written counterproposals on DRP to be outside the duty to bargain.

13. The parties met on January 6 and 7. On January 7 Respondent did not accept any of the Union's proposed language. The Union declared that an impasse existed.

14. On January 10 the Union submitted additional written counterproposals to Respondent. The format of those proposals involved the Union having taken the initial DRP proposals, which had been the basis for the entire negotiations, and typing its counterproposals on those parts of the Plan which the Union sought to modify. (Joint Exhibit No. 4).

15. The two proposals which are at issue herein are the following:

(a) "Assign staff to inspect all elevators and insure safe operating conditions"

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[4] Unless otherwise indicated, all dates hereinafter mentioned occur in 1986.

(Joint Exhibit No. 4. Page 15, Column Engineering Service and Internal Disaster, No. 6)

(b) "Store emergency stock and distribute as required: hand held walkie-talkies." (Joint Exhibit No. 4, page 16, Column Supply Service and Internal Disaster, No. 2)

16. On January 14 the Union requested the assistance of the Federal Mediation and Conciliation Service (FMCS).

17. On January 16 Respondent forwarded a correspondence to FMCS, wherein Respondent informed FMCS that the parties were not at impasse in their negotiations over the DRP because Respondent took the position that the Union's counterproposals were all non-negotiable.

18. On January 20 Respondent implemented DRP without having included the Union's typed-in counterproposals.

19. In a letter dated January 22, H.R. Maar, Jr., Chief of Respondent's Personnel Service, wrote Rhea Butler, President of the Union, and informed him that the Union's counterproposals, received on January 10 by Respondent, were non-negotiable.

20. Respondent admits that the DRP results in an impact or a reasonably foreseeable impact on bargaining unit employees which is more than *de minimis*. It denies that the two proposals herein at issue have an impact which is more than *de minimis* in and of themselves.5/

Conclusions

It is contended by General Counsel that Respondent violated Section 7116(a)(1) and (5) of the Statute by unilaterally implementing the Disaster Response Plan without completing bargaining with the Union on the impact and implementation thereof. In particular, it is asserted that the two Union proposals, i.e. (a) the assigning of staff to inspect all elevators and insure safe operating conditions, (b) the storing and distributing of hand held walkie-talkies

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5/ This admission and denial were part of the Stipulation of Facts (Joint Exhibit No. 1).

to top management, were negotiable appropriate arrangements for adversely affected employees under 7106(b)(3) of the Statute. Further, General Counsel argues that the impact in each instance is more than de minimis; that the two proposals do not excessively interfere with the exercise of management's rights.

Respondent insist that the real issue is one of negotiability rather than a unilateral implementation, and hence it is contended that the Complaint should be dismissed. In respect to both proposals, management deems them to be a limitation on its rights as set forth in Section 7106(a)(2)(D), which allows management to "take whatever actions may be necessary to carry out the Agency mission during emergencies." Respondent disputes the contention of General Counsel that employees will be adversely affected by the DRP, and it insists there is no showing that the Union's proposals would, if such effects be shown, remedy them. It is urged that the issue re the inspection of elevators is a management right to assign work under 7106(a)(2)(B), and that such inspection is already part of the Plan. As to walkie-talkies, Respondent asserts that this proposal does not involve a condition of employment; that it deals with a management right concerning the technology of performing work under 7106(b)(1) of the Statute and is only a permissible subject of bargaining. Hence, argues Respondent, both of these Union proposal's are non-negotiable.

At the outset it is contended by Respondent that the issue herein concerns the negotiability of the Union's counterproposals rather than the unilateral implementation of the DRP. Therefore, it is asserted, the matter should be raised in a negotiability proceeding rather than as an unfair labor practice.

It is true that under Section 2423.5 of the Authority's Rules and Regulations a union, which has filed both an unfair labor practice charge involving a negotiability issue and has filed a petition for review of a negotiability issue, must select one of these procedures. However, where the union proceeds via the unfair labor practice route, the Authority has held that negotiability determinations may be made in that proceeding. A union is thus not required to pursue the negotiability procedure beforehand. Department of Defense, Department of the Navy, Naval Ordinance Station, Louisville, Kentucky, 4 FLRA 760. Accordingly, since the thrust of the instant Complaint involves unilateral implementation of the DRP based on a refusal to negotiate on the two proposals in connection with the DRP and a remedy is sought for the alleged unfair labor practice, I reject Respondent's contention that the Union is required to seek a negotiability determination pursuant to the procedures under Part 2424 of the Regulations.

The focal point of the dispute herein involves the negotiability of two union proposals: (a) assign staff6/ to inspect all elevators and ensure safe operating conditions; (b) store emergency stock and distribute as required: hand held walkie-talkies. Instituting the DRP without negotiating these proposals is alleged herein to be a refusal to bargain re the implementation of the Plan and its impact upon unit employees.

In respect to the proposal that elevators be inspected, Respondent contends that the assignment of employees to conduct such inspection is a management right under Section 7106(a)(2)(B) of the Statute.7/ Further, it argues that since the proposal interferes with management right, it is nonnegotiable; that no circumstances prevail which call for a contrary conclusion which requires Respondent to negotiate thereon.

The Authority has had occasion to consider the obligation of an agency to negotiate concerning union proposals which constitute an infringement upon management's rights under 7106(a)(2)(B) of the Statute. Even where a particular proposal violates management's right to assign work under the Statute, it may not necessarily be deemed

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6/ While not so specified, the import of the record herein warrants the conclusion that "staff" refers to unit employees.

7/ This section provides that . . . "nothing in this chapter shall effect the authority of any management official of any agency--.

. . . .

(2) in accordance with appliable laws--

. . . .

(B) to assign work, to make determinations with respect to contracting out, and to determined the personnel by which agency operations shall be conducted."

non-negotiable. Consideration is given to whether it is an appropriate arrangement for employees adversely affected by the exercise of the management right. If so, the basic issue then exists as to whether the burden placed by the proposal upon management's right to assign work is excessive compared to the benefits of the provision to the employees. A determination that the burden on management's right to assign work is insubstantial compared to the benefit to employees afforded by the proposal, and does not excessively interfere with management's right to assign work, will render the proposal an "appropriate arrangement" under 7106(b)(3) of the Statute. National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 23 FLRA 273; American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA 307; National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24.

General Counsel avers that the proposal by the Union that Respondent assign staff employees to inspect the elevators does not infringe upon management's rights under 7106(a)(2)(B). It asserts management would still have the discretion to decide which elevators, as well as the particular buildings, would be the object of inspection. Further, the agency could decide the manner in which they would be inspected. Contrary to this assertion, I conclude that this proposal would violate management's right to assign work. The effect of this provision is to require the assignment of employees to inspect the elevators. It would leave the agency no discretion to assign this function to supervisors or managerial personnel, nor would it permit the utilization of an outside inspection service. See International Organization of Master, Mates and Pilots and Panama Canal Commission, 11 FLRA 115, 120; National Association of Air Traffic Specials and Department of Transportation, Federal Aviation Administration, 6 FLRA 588, 595-596. In the cited cases it was concluded that the proposals, which did preclude such discretion, ran afoul of section 7106(a)(2)(B). Likewise in the case at bar, the requirement that Respondent assign employees to inspect the elevators in the event of a disaster leaves management with no choice to utilize other sources for inspections. Under this proposal the agency could not assign the task to supervisors or management officials, which would violate its right to assign work under the Statute. National Association of Government Employees, AFL-CIO, Local R14-87, and Deaprtment of the Army and the Air Force, Kansas Army National Guard, 19 FLRA 381.

Consideration must be given as to whether the proposal re assigning staff employees to inspect the elevators is an appropriate arrangement for employees adversely affected by management's right in that regard. The inspection of all elevators at the time of a disaster, such as an earthquake, clearly involves the safety and lives of employees. Working conditions may be impaired and severe hardships endured if elevators are not in working order. It seems clear that the Union's proposal to assign employees to inspect the elevators qualifies as an "arrangement" to provide for any adverse effects in the event of disaster.

The remaining issue is whether the arrangement, as proposed herein, is appropriate for negotiation. This is determined by weighing the competing practical needs of employees and managers. If, as declared by the Authority, the benefits to employees outweighs the effect upon management's right to assign the task of inspecting elevators, no excessive interference with such right will be found. See National Association of Government Employees, Local R14-87 and Kansas Army National Guard, supra.

The undersigned is persuaded that the proposal to have elevators inspected by staff employees does not excessively interfere with management's rights. Failure to inspect the elevators could create a very significant and adverse impact upon the employees in the event of any fault in the machines. This is self-evident. Moreover, the individuals (Engineers) who "man" the elevators could well be assigned the task of conducting such inspection without imposing any burden upon management. Respondent still retains the right to select the employees who will inspect the elevators. Further, the proposal does not preclude management from deciding on the number of employees it will utilize to perform this function. Nothing in the record suggests a finding that any negative impact upon Respondent's right to so assign such duty is disproportionate to the benefits to be gained by the arrangement. Management itself has a vital interest in such inspection. It too will benefit by having the elevators inspected on the site by its engineers[8] since any disruption of utilities, as a result of impaired equipment could have dire consequences.

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[8] Respondent takes the position that the phrase "assigns staff to man elevators, bldg. 500", as set forth in the DRP, includes the inspection of the elevators. Apart from the fact that the Plan only refers to one building--and there are 23 other buildings with 40 elevators which would in no event be covered by the DRP language - I do not agree with such constitution. To "man" elevators is seemingly referable to "operate" rather than inspect the elevators.

Accordingly, and by reason of the foregoing, I conclude that any burden imposed by this proposal on management's right to assign work is insubstantial compared to the benefit to employees derived from the Union's proposal concerning the inspection of elevators. Further, that the Union's proposal "Assign staff to inspect all elevators and insure safe operating conditions" is negotiable. Thus, the refusal by Respondent to bargain therein, and its implementation of the Disaster Response Plan on January 20, 1986 without negotiating completing negotiation concerning the impact and implementation of the plan on unit employees was violative of Section 7116(a)(1)(5) of the Statute.

The other proposal by the Union, which is the subject of dispute as to its negotiability, involves the distribution of walkie-talkies. As proposed, the provision was as follows: "Store emergency stock and distribute, as required: hand held walkie-talkies." The record reflects that 42 walkie-talkies are in use at Respondent's facility- 24 being used by police officers, 3 are utilized by the Medical Center Director, and 15 are used by the Engineering Service. It also appears from the record that the Union's proprosal in this regard was that all management people should carry hand-helds[9] so they could communicate with each other during a disaster in the event no phone service was available. Union president Rhea Butler testified, in respect to which individuals should have this instrument, that the Union wanted walkie-talkies to be given to top management officials - directors, assistant directors, chief of Personnel, those people responsible for "coordinating and pulling together."

The Authority has occasion to consider negotiability issues arising when proposals by a union concern non-unit employees. In such instances it was concluded that the duty to bargain does not extend to matters concerning positions and employees outside the bargaining unit. While an agency may, if it so desires, negotiate over such matters, it has no obligation to do so. See, National Treasury Employees Union and Nuclear Regulatory Commission, 20 FLRA 172; National Federation of Federal Employees, Local 1705 and General Services Administration, 17 FLRA 945.

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[9] The term "hand-helds", as used in the record, refers to walkie-talkies.

Turning to the proposal herein pertaining to the distribution of walkie-talkies, the General Counsel maintains that it affects unit employees. It is argued that the lives and safety of the latter group are involved and thus working conditions are affected by the use of walkie-talkies. While it may be true that unit employees are in some manner affected by most matters involving non-bargaining employees, the ultimate issue for determinations is whether union proposals directly concern unit employees. In the case at bar the Union's interest, and its purport in making the proposal, was that all management personnel receive walkie-talkies. The proposal was not intended, as the record reveals, that those items be given to bargaining unit employees. As such, I cannot agree with General Counsel's contention in this regard. Since the Union's proposal re walkie-talkies concerned the distribution of such instruments to top management people, it involved positions and employees outside the bargaining unit and was only bargainable at the election of the agency. Hence, I conclude Respondent's refusal to bargain thereon was not violative of the Statute.

Having concluded that Respondent violated Section 7116(a)(1) and (5) of the Statute by instituting its Disaster Response Plan without bargaining with the Union on the impact and implementation of such Plan in violation of Section 7116(a)(1) and (5) of the Statute, it is recommended that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority thereby orders that the Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, shall:

1. Cease and desist from:

   (a) Unilaterally implementing the Disaster Response Plan at the Veterans Administration, West Los Angeles Medical Center, California without negotiating with the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of its employees, concerning the implementation of the Disaster Response Plan and its impact upon unit employees, including the assignment of staff employees to inspect all elevators at its West Los Angeles

Medical Center and assure safe operating conditions.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action:

(a) Upon request, meet and negotiate with the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of its employees, concerning the implementation of the Disaster Response Plan and its impact upon unit employees, including the assignment of staff employees to inspect all elevators at its West Los Angeles Medical Center and assure safe operating conditions.

(b) Post at its West Los Angeles Medical Center copies of the attached Notice on forms to be furnished by the Federal Labor Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director or his designee and shall be posted for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations notify the Regional Director, Region 8, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM NAIMARK
Administrative Law Judge

Dated: January 28, 1987
Washington, D.C.

[6-CA-60122]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement the Disaster Response Plan without negotiating with the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of our employees, concerning the implementation of the Disaster Response Plan and its impact upon unit employees, including the assignment of staff employees to inspect all elevators at its West Los Angeles Medical Center and assure safe operating conditions.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, meet and negotiate with the American Federation of Government Employees, Local 1061, AFL-CIO the exclusive representative of its employees, concerning the implementation of the Disaster Response Plan and its impact upon unit employees, including the assignment of staff employees to inspect all elevators at its West Los Angeles Medical Center and assure safe operating conditions.

____
(Agency or Activity)

Dated: __________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 8, whose address is: 350 S. Figueroa Street, 10th Floor, Los Angeles, CA 90071, and whose telephone number is: (213) 688-3805.

[7-CA-60237]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

Case Nos. 7-CA-60237

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on February 5, 1987, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., March 20, 1987.

Jacqueline R. Bradley for
Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE,
OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1592

Charging Party

Case No. 7-CA-60237

Clare A. Jones, Esquire
For the Respondent

Nicholas J. LoBurgio, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region VII, Federal Labor Relations Authority, Denver, Colorado, against the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah (Respondent), based on a charge filed by the American Federation of Government Employees, AFL-CIO, Local 1592 (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by issuing William S. Shoell a lower annual performance appraisal than in previous years in reprisal for Shoell having engaged in activities protected by the Statute.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Ogden, Utah. The Respondent, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

William S. Shoell has been president of the Union, a part of the American Federation of Government Employees, Council 214, since May 1985. The Union services a unit of approximately 14,000 employees at Respondent's facility. Prior to becoming the Union president, Shoell was chief steward for the maintenance division for approximately seven years and had also held the position of the Union executive vice-president from May 1984 until his election as president. Prior to his election a Union president, Shoell spent approximately 80%-90% of his normal duty time on Union representational activities. Respondent's managers knew of this use of official time because Shoell and/or his supervisor prepared an AFLC Form 949 "Union/Employee Official Time Permit" for release for authorized Union activities.

Shoell's normal duties as an ordnance equipment mechanic (OEM), were to receive Minuteman missiles, perform incoming tests on them, tear them down, route components to appropriate shops, obtain new components, reassemble the missiles, and do final tests. About eight years ago, when Shoell was the Union's division steward, he was reassigned from normal OEM duties to duties in the unit office, which were an extension of OEM duties, but which allowed him more time for his representational functions. These ancillary duties, assigned by Respondent's supervisors through July 15, 1985, included reviewing technical orders for accuracy, assuring that components were in proper configuration, assisting in tests, doing safety checks, tracking safety problems, reviewing work orders, and ordering equipment, along with doing inventory control.

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[1] The General Counsel's unopposed motion to correct the transcript is granted. The transcript is corrected as set forth therein.

During this prior eight year period, none of Shoell's supervisors had any difficulty in giving him appraisals, nor did they express any problems to him that it was impossible to give him appraisals because he was not doing work directly from his position description, but, instead, was doing other management assigned duties. In this regard, Shoell's first-line supervisor from at least February 1, 1983 until July 15, 1985 was Frank Winward, and his second-line supervisor from at least February 1, 1983 to date has been George Freestone. Both of these individuals participated in the appraising of Shoell's performance in 1984 and 1985 while he was engaged in representational activities encompassing 80%-90% of his duty time. Freestone signed these appraisals as reviewing official, in addition to having independent first hand knowledge of Shoell's work conduct for the whole period of Shoell's tenure as his subordinate.

Both the 1984 and 1985 appraisals gave Shoell an overall numeric appraisal score of 50, found that Shoell met all of his critical elements and performance standards, incorporated an overall adjectival rating of "Fully Successful," and, in the narrative substantiation of rating section, stated only that Shoell "met" all performance requirements.

Winward also supervised Shoell during the first five and one-half months of the appraisal period which is the subject of the events in the present case (i.e., February 1, 1985 to July 15, 1985). During this last period of Winward's supervision, when Shoell still worked in the unit office only 10-20% of the time, Shoell performed the same work for which he had been appraised during the prior seven years, and had the same position description, without any change (since at least February 1, 1983) in his critical elements and performance standards.

During the first five and one-half months of the appraisal year ending on January 3, 1986, when Shoell performed work for Winward 10-20% of the time, Shoell performed required building safety checks, without question as to his ability or competence to perform them; he observed incoming, tear-down, intermediate and outgoing missile checks, without any question regarding his ability to perform them; and he spent most of his unit office work time reviewing "tech" data, without Winward questioning his ability or motivation to perform the work. Respondent adduced no evidence that Shoell's work product changed for the worse in the period of Winward's or Hanson's supervision during the most recently completed appraisal year. Shoell testified, without contradiction, that Winward did tell him that his work had not changed during the appraisal year in question.

In May 1985, Shoell, after being unsuccessful in getting safety problems resolved by Marilyn Duffy, his then Branch Chief and fourth level supervisor, exposed these problems to higher-level management (the Director and Deputy Director of Maintenance) through a labor-management meeting. Thereafter, following rumors in June that he was being reassigned from his unit office duties (where he learned of the safety problems), Shoell attended a meeting with Duffy and others where she reassigned him from Winward to Hanson. In this meeting, Shoell was told of his new supervisor, that he would not be performing unit office work upon reassignment, and he was given a list of activities for which he would be granted official time as Union president. Hanson was not given the option of having Shoell in his crew.

Shoell offically began working for Hanson on July 15, 1985, although it is uncontroverted that during the whole period of Hanson's supervision, until January 31, 1986, the end of the appraisal year, Shoell spent essentially 100% of his time on approved official time for Union representational activities. In this regard, Shoell reported to Hanson each morning and advised his supervisor of the Union activities which he was going to perform that day. Shoell received approval, assured that a "949" was prepared by Hanson, and then left for his representational activities.

Hanson testified it hindered his ability to get the work done when all of his crew was not present, that it helped when Shoell was present, as opposed to being gone on Union activities, and his unit's productivity was affected when Shoell was not there. On at least seven occasions, between July 15, 1985 and January 31, 1986, Hanson denied Shoell the requested official representational time. However, Shoell was still given official time under the contract in order to prepare grievances over these denials. Shoell and/or the Union filed at least seven grievances against Hanson for this denial of official time. Hanson testified that these were the first grievances filed against him and that he was unhappy that they had been filed. These grievances were resolved in May 1986, although Hanson testified at hearing that he thought they were still "in the fire."

The appraisal period for Shoell and the other employees under Hanson's supervision ended on January 31, 1986. According to Hanson, he prepared all of the appraisals thereafter and gave them to the unit employees. All of the unit employees signed their appraisals on February 20, 1986 except Shoell, who was given and signed his appraisal five days later, February 25, 1986.

Although Shoell worked for Winward nearly one-half of the appraisal year ending on January 31, 1986 and never performed work for Hanson, Hanson did not contact Winward concerning Shoell's work assignment or performance during that period. Air Force Regulation 40-452, Table 2-1, requires at footnote 2, that when employees are reassigned to different supervisors, the supervisor, as of January 31 of the year, writes the appraisal "with input from losing supervisors." Pursuant to paragraph 2-6, the regulation requires a close-out appraisal by the losing supervisor when there is a change in rating official. Hanson did not solicit any such close-out appraisal from Winward. In addition, a letter which Respondent's Personnel Office sent to all supervisors regarding preparation of appraisals in 1986 recommended contact between old and new supervisors where necessary in situations where there has been a change during the year. Hanson testified he did not base any of the appraisal on the work Shoell actually performed for Winward and did not know of, or refer to, any previous appraisals of Shoell by Winward. Instead, Hanson stated that he based the appraisal on his recollection of the type of work Shoell performed when he and Shoell had been on the same work crew years before. Hanson testified that he gave Shoell a "presumptive rating" and so annotated the appraisal at its third page. Pursuant to AFR 40-452, Table 2, a presumptive rating is allowed only when the appraisal is for an employee receiving his initial, not annual, appraisal. Hanson admitted that the February 25, 1986 appraisal was not Shoell's initial appraisal and that he did not review the applicable regulation on presumptive ratings when preparing Shoell's appraisal.

Hanson admitted he had difficulty in appraising Shoell. He explained that the reason for this difficulty was because Shoell was never there, except for the first 45 minutes of the day when Shoell filled out his release forms for Union activity, and Shoell did not perform any of the duties reflected in his position description. Hanson testified that he felt scores of 5 on each of the appraisal factors were fair and consistent with his knowledge of Shoell's abilities and potential based on his performance when they had worked together years before. He presumed that Shoell still had the same abilities to do the job.

Regarding receipt of the appraisal itself, on February 25, 1986, Shoell went to work in order to get his release from Hanson for Union activities. He was handed the appraisal by Hanson who said, "Don't get pissed at me, but all I can say is that mine and George's signature is on there." Shoell then reviewed the appraisal and said (since he felt Hanson was an "up front" person), that it was obvious to him that Hanson and Freestone "had not done this." According to Shoell, Hanson said, "All I can say is your appraisal for the last two months has been up in Marilyn Duffy's office." According to Shoell, he then asked Hanson about the substantiation section of the appraisal, which had never been so extensively filled out before by Winward, and Hanson said that all he could say was he'd "seen it the day before he gave it to me, him and George saw it as I got it." During this testimony, Shoell also recalled that Hanson told him words to the effect that he didn't know why Shoell got the appraisal unless it was because of his Union activities and he was not sure why they gave Shoell the narrative or even the fives.[2]

Regarding the 1986 appraisal itself, Hanson indicated that Shoell "met" all of his critical elements and he was given an overall adjectival rating of "Fully Successful," just as he had been given on his prior ratings. However, his numeric score on the appraisal factors section dropped to all "5s", or a composite 45 on the 1986 appraisal, from its prior level of 50. The narrative substantiation portion was also annotated, unlike prior years.

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[2] Hanson denied all of the comments attributed to him by Shoell. He preceded these denials with his own admission that he did not recall any conversation with Shoell upon delivery of the appraisal, except to the extent that Shoell said he was not satisfied, that he was going to file, and that he was concerned about the low score and the presumptive part. Hanson denied that Shoell's Union activities were involved in the appraisal or that anyone had dictated to him any portion of the appraisal. I credit Shoell's testimony concerning the comments made to him by Hanson. However, this evidence is insufficient for a conclusion that anyone other than Hanson completed the appraisal. Hanson may have made these statements to Shoell to protect himself in the eyes of Shoell and to put the blame for the rating on his supervisors inasmuch as he and Shoell worked together years before and seemed to have some regard for one another.

Numeric appraisal factors are the grade which the employee receives for each of the nine identified factors. Receiving a score in the low range means that the employee is not successful, while receiving a score in the high range puts an employee in a better position for promotions and cash awards. The overall numeric score is determined by adding together the individual scores; the maximum score being an "81." The appraisal ratings are added together and combined with credit the employee receives for experience in order to establish a "profile" for merit promotion purposes. If two employees both receive "Fully Successful" ratings, but have different appraisal factor scores, the individual with the higher total numeric score would be more likely to appear on the promotion profile. It normally takes a score in the 60s or 70s to appear on a promotion profile. Shoell, with scores of 50 over a two year period, has not appeared on any promotion profile.

The narrative portion of the 1986 appraisal need not be filled out unless the employee being appraised receives very low or very high ratings. There is a linkage between the appraisal factor scores and the preparation of Part III (the narrative substantiation). There is also a link between the critical elements upon which an employee is rated and the Part III substantiation and the overall numeric score because many supervisors use the substantiation page to justify their ratings.

There are eight broad performance standards with several sub-categories. As indicated above, Hanson indicated that Shoell had "met" each of these standards. With respect to Hanson's separate narrative comments, shown on the left below is a brief description of these standards and on the right are Hanson's narrative comments concerning Shoell's performance of these standards.

Element	Hanson's comments concerning Shoell
1. Safety checks.	1. Not having performed any safety checks during period of supervision, presumabl[y], Mr. Shoell owns the skill to so perform.
2. Electrical tests.	2. Mr. Shoell conducted no tests while assigned to me. Therefore, must presume that he could, if he would.
3. Assembly and Disassembly.	3. Did not perform any aspect of standard.
4. Inspection.	4. Performed no inspections.

5. Regulation Compliance	5. Does not review tech data. Presumably he could were he motivated to do so.
6. Utilizes time effectively.	6. All time is effectivel[y] con[s]umed outside the work area.
7. Maintains a neat and orderly work area.	7. Maintains a meticulous work area.
8. Maintains acceptance certifications.	8. Has not completed certifications. Must presume he has capability to do so.

THIS IS A PRESUMPTIVE RATING.

As noted, Hanson used the terms "presumably," etc., because he presumed Shoell could do the duties because of his prior knowledge of Shoell's performance some years before. Regarding paragraph 1, the record reflects that Shoell did some safety checks for Winward, but Hanson did not check with him concerning this work.

Concerning paragraph number 2 of the narrative, Hanson wrote, "Mr. Shoell conducted no tests while assigned to me. Therefore, must presume that he could, if he would." Hanson testified that the only reason Shoell was not there to perform these tests was because of his Union activities. Hanson admitted, however, that Shoell had never refused to perform the tests, that he did not have any question about Shoell's capability to perform the tests, that he had never discussed with Shoell how he was to be rated on doing tests, and that Shoell was the kind of person who, if told to do something, would do it. Shoell confirmed these admissions of Hanson. On the portion of the narrative ending with the words "if he would," Hanson admitted that it meant Shoell would do the tests, except that he was gone all of the time on Union activities. Hanson remarked, in addition, that if he had a problem with an employee failing to perform assigned tasks, he would counsel them and annotate their "971." Shoell had no such counsellings or "971" annotations. Shoell interpreted the "if he would" remark to be a cheap shot, an innuendo, that he would not do tests because of his Union activities. In this regard, Shoell's uncontradicted testimony revealed that an employee's appraisal is accessible to other supervisors during the promotion process and that, from Shoell's experience in processing grievances and being involved with supervisors, such annotations as were placed in his appraisal would be taken as very derogatory information.

In relation to annotation number 5, where Hanson noted, "Does not review tech data. Presumably he could if he were motivated to do so," Hanson admitted that but for the fact that Shoell was gone to the Union office he would have been undertaking this task. More specifically, as to the remark "if he were motivated to do so," Hanson testified that his explanation of motivation was that Shoell "had the ability, like I say, but with his Union activities he wasn't there to do that," and that what Shoell was motivated to do, instead of reviewing tech data, was "Union activities." Concerning this motivation remark, Hanson also admitted, that if this remark were on his appraisal, and he disagreed with it as a description of his work, "I'd feel bad about it, and I'd bring it to their attention." Hanson further stated that if he had a problem with an employee's motivation, he would counsel them and annotate their "971." Shoell was not counselled, nor was his 971 annotated. Shoell testified that Hanson never asked him to review tech data, never questioned his ability or competence to review the data, nor his motivation to review the data. Shoell also believed this remark on motivation was a "cheap shot" because he was always willing to go the "extra mile."

With respect to annotation number 6, where Hanson wrote, "All time is effectively consumed outside the work area," he testified that what he meant by this remark was that Shoell was outside the work area in the Union office. Shoell understood the remarks to mean exactly that.

Finally, as to number 7, where Hanson wrote that Shoell "Maintains a meticulous work area," Hanson agreed that this term referred to the fact that Shoell kept a clean area when he was filling out his passes - the "949" - each day; that is, he kept a clean area when he was asking Hanson for permission to conduct Union activities. Shoell did not have a work area while working for Hanson.

Hanson denied that he intended any derogatory reflection upon Shoell by the statements in the narrative portion of the appraisal.

Discussion, Conclusions, and Recommendation

The General Counsel contends that Respondent, through Hanson, issued Shoell an appraisal that was both quantitatively and qualitatively lower than those which he had received in prior years based upon, and in reprisal for, his protected activities under the Statute in violation of section 7116(a)(1) and (2) of the Statute. The General

Counsel claims that Shoell was engaged in protected activities and Respondent not only knew of these activities, but was also very concerned, at the highest level, about them. The General Counsel asserts that Shoell's protected activities were the motivating factor for, and literally encompassed within, the appraisal. It is alleged that the derogatory comments in the narrative appraisal not only violate the Statute, but provide the framework for the violation of lowering of the numeric scores. The General Counsel contends that the failure of Respondent to follow its own performance appraisal regulation on old-new supervisor contact; the use of the presumptive rating; and the lack of notice as to how Hanson would appraise Shoell are indicia that Respondent's asserted legitimate basis for the rating is a pretext. The General Counsel also argues that it is disenginous for Respondent to argue that even if the appraisal were lower it could have no effect because Shoell would not appear on a promotion profile even with a higher score.

Respondent defends on the basis that issues of credibility should be resolved in favor of Hanson; that he is a man of integrity who alone rendered the appraisal. Respondent claims that, with respect to the numerical rating, it would be virtually impossible for someone to articulate the difference between an employee receiving a five on an appraisal as opposed to a six, and with respect to the narrative, Hanson completed the narrative portion as a conscientious effort to explain why Shoell was rated the way he was and gave him every benefit of the doubt although Shoell had performed no work for Hanson. Respondent contends that Hanson was not obligated to confer with the former supervisor, Winward, but, even if he should have done so, this might give rise to a grievance, but would not constitute an unfair labor practice. Respondent points out that the reviewing official, Freestone, was aware of Shoell's work throughout a three year period. Respondent claims that the statements attributed to Hanson by Shoell were not made, and Hanson was not influenced in any way by upper-level management. Respondent also submits that the difference between Shoell's most current score of 45 with the narrative comments and previous scores of 50 had no adverse impact on his promotion potential as Shoell, with only a score of 50, would never appear on a promotion profile.

I have credited Shoell's testimony and conclude that the General Counsel has established a violation by a preponderance of the evidence. It is beyond dispute that Shoell was engaged in protected activities and that Respondent knew of these activities.

The record also establishes that Shoell's protected activities were the motivating factor in the lower appraisal that Shoell received. Hanson told Shoell that he "didn't know why Shoell got the appraisal unless it was because of his Union activities." In addition, the record establishes that some of Hanson's narrative comments were derogatory and were based on Shoell's protected activities. Hanson admitted that his comment that Shoell "could [conduct electrical tests], if he would" was based on Shoells Union activities, but meant only that Shoell would do the tests except he was gone all of the time on Union activities. I conclude that the words would be interpreted by most persons, as they were by Shoell, not to mean that Shoell would do the tests, but was precluded from doing so, but, rather, that Shoell could conduct tests, but would not do so, or was not properly motivated to do so. Hanson's evaluation that Shoell "could [review technical data] were he motivated to do so" meant, according to Hanson, that Shoell "had the ability. . . but with his Union activities he wasn't there to do that." Instead, according to Hanson, he was motivated to perform Union activities. The comment would be interpreted by most persons, as it was to Shoell, to be a derogatory comment meaning that Shoell was not properly motivated to perform this aspect of this job. The comment was clearly based on the conclusion by Hanson that Shoell's lack of motivation was due to his involvement in Union activities. In paragraph 6 of the appraisal's narrative, relating to the effective use of time, Hanson testified that his remark, that all of Shoell's time was "effectively consumed outside the work area" referred to the fact that Shoell spent his time outside the work area in the Union office. Hanson's testified that his comment that Shoell "maintains a meticulous work area" referred to the fact that Shoell kept a clean area when he filled out his passes for Union activity. He did not have a work area as such. Taken in relation to the other comments, this would also be a derogatory comment meaning, in effect, that Shoell maintained an absolutely neat and uncluttered work area because he was not doing anything there. These derogatory comments in the performance appraisal, based as they were on Shoell's protected activities, constituted a lowering of the appraisal and violated the Statute, as alleged, *United States Air Force, Lowry Air Force Base, Denver, Colorado*, 16 FLRA 952, 958 (1984); *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 14 FLRA 311 (1984)]; *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 12 FLRA 667, 679-680 (1983).

Given the derogatory narrative comments based on protected activities, I agree with the General Counsel that the numeric scores, different and lower from previous appraisals, cannot stand untainted by these comments. The scores were admittedly not based on Shoell's work during the pertinent period, as they should have been if Hanson had conferred with the former supervisor, Winward, as recommended by the pertinent directives. There is no evidence that the reviewing official, Freestone, who had some knowledge of Shoell's work, made any contribution to the preparation of the appraisal. I also reject Respondent's argument that Shoell's score of 45 would have no effect on hiring, tenure, promotion, or other conditions of employment because Shoell, with only a score of 50, would probably never appear on a promotion profile and the narrative comments would likely never be seen by a selecting supervisor. A performance appraisal becomes a permanent part of an employee's personnel record. As such, it is a condition of employment under section 7103(a)(14) of the Statute. It is clear under section 7116(a)(2) that an agency may not discriminate against an employee in connection with a condition of employment for having engaged in protected activity.

It is concluded that Respondent, by issuing Shoell a lower annual performance appraisal in its narrative and numeric provisions on or about February 24, 1986, in reprisal for Shoell having engaged in activities protected by the Statute, discouraged membership in a labor organization by discrimination in connection with a condition of employment in violation of section 7116(a)(2) of the Statute and interfered with Shoell's exercise of protected rights under the Statute in violation of section 7116(a)(1) of the Statute, as alleged.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah shall:

1. Cease and desist from:

(a) Discriminating against William S. Shoell, or any other employee, by lowering an annual performance appraisal in reprisal for the employee having engaged in protected union activity.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the February 24, 1986 annual performance appraisal of William S. Shoell, expunge it from his personnel file, and prepare a new appraisal pursuant to applicable rules and regulations which does not penalize his approved official time for labor-management relations or otherwise take into consideration his protected union activity.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations notify the Regional Director, Region VII, Federal Labor Relations Authority, Denver, Colorado, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: February 5, 1987
Washington, D.C.

[7-CA-60237]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against William S. Shoell, or any other employee, by lowering an annual performance appraisal in reprisal for the employee having engaged in protected union activity.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the February 24, 1986 annual performance appraisal of William S. Shoell, expunge it from his personnel file, and prepare a new appraisal pursuant to applicable rules and regulations which does not penalize his approved official time for labor-management relations or otherwise take into consideration his protected union activity.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, OFFICE OF
HEARINGS AND APPEALS,
REGION I, (BOSTON,
MASSACHUSETTS)

Respondent

and   Case No. 1-CA-60076

NATIONAL TREASURY EMPLOYEES
UNION

Charging Party

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on February 27, 1987, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action stated in the Order.

For the Authority.

Issued, Washington, D.C., April 14, 1987.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, OFFICE OF
HEARINGS AND APPEALS,
REGION I, (BOSTON,
MASSACHUSETTS)

Respondent

and

Case No. 1-CA-60076

NATIONAL TREASURY EMPLOYEES
UNION

Charging Party

. . . .

Joyce F. McCourt, Esq.
For the Respondent

Michael B. Filler
For the Charging Party

Marilyn H. Zuckerman, Esq.
For the General Counsel of FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et. seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et. seq.

Pursuant to a charge filed on November 29, 1985, and later amended on February 14, 1986, by the National Treasury Employees Union, (hereinafter called the Union or NTEU), against Department of Health and Human Services, Office of Hearings and Appeals, Region I, Boston, Massachusetts, (herein called OHA/RO or Respondent), the General Counsel of the FLRA, by the Director of Region I issued a Complaint and Notice of Hearing on February 12, 1986 alleging that OHA/RO violated Sections 7116(a)(1) and (5) of the Statute by unilaterally banning smoking in common work areas in the Boston Hearings Office, (herein called the OHA/BHO), without providing the Union with notice of the change or an opportunity to bargain concerning it. Respondent filed a timely Answer denying that it had violated the Statute.

A hearing was conducted before the undersigned in Boston, Massachusetts. Respondent, NTEU and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs and supplemental briefs were filed and have been fully considered.

Based on the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the record I make the following:

Findings of Fact

The NTEU is the exclusive representative of professional and non-professional employees in the following collective bargaining unit: U.S. Department of Health and Human Services, Boston Regional Office, Region I (RO). Staff Attorneys in the Regional Office of the Office of Hearings and Appeals (OHA/RO) and the Boston Hearings Office (OHA/BHO, Respondent) are specifically excluded from the unit as are all other employees who are ineligible for statutory reasons. The unit contains approximately 360 employees including employees in OHA/BHO.

The parties have negotiated two written agreements. On October 8, 1985, the Boston Regional Office and NTEU executed a collective bargaining agreement (CBA) which became effective on December 7, 1985. On October 16, 1985 the OHA/RO and the Union executed a Memorandum of Understanding (MOU) which dealt with the implementation of functional teaming in the OHA/BHO. The CBA, in part, provides as follows:

Article II - Effect of Law and Regulations

Section 1

> "In the administration of conditions of employment specifically covered by the Agreement, the Parties are governed by this Agreement, existing and future Employer rules, regulations and policies not in conflict with this Agreement, Government-wide rules and regulations and/or Federal Law."

Article XXVI - Health and Safety

Section 1

> "The Employer will make every reasonable effort, consistent with its mission and the hazards of the work to be performed, to provide a place of employment which is free from recognized hazards which could likely cause physical harm to its employees. In this effort, when and where it is within its authority and control to do so, the employer will adopt, as guidelines, the General Standards of the Occupational Safety and Health Administration as the Safety and Health Standards for its facilities."

Section 12

> "To the extent feasible, the Employer will attempt to separate smokers and non-smokers when requested by the non-smoker, so that the non-smoker will be minimally affected by the smoking employees."

Additionally, the CBA has, a broad scope grievance procedure restates external rules governing reasonable accommodations to qualified handicapped employees [Article XXI, Secs. 4 and 7, and Article LIII, Part (1) (d)]. With regard to smoking and handicapped employees, the MOU provides as follows:

8. Non-Smokers and Handicapped Employees

> "The Agency shall make reasonable accommodation for non-smokers in the unit, including air purifiers, baffles and similar or like devices and accommodations. The Agency shall make reasonable accommodations for qualified handicapped employees as required by applicable law, rule or regulations."

On January 11, 1978, Joseph A. Califano, then Secretary of Health, Education and Welfare, the predecessor organization to the Department of Health and Human Services, issued a memorandum announcing a revised HEW smoking policy in facilities occupied by HEW employees. Attached to the Secretary's memorandum, and referred to therein, was a revised General Administration Manual, Chapter 1-60, which stated the Department's smoking policy with more particularity. Section 1-60-10 of Chapter 1-60 states the general policy:

> A. "It is the policy of the Department to protect the rights of nonsmokers (both Federal employees and the public) by restricting smoking in certain areas of HEW-occupied buildings and facilities. The Department also recognizes the rights of individuals to smoke, provided such action does not endanger life or property, cause discomfort or unreasonable annoyance to nonsmokers or infringe upon their rights.
>
> B. In recognition of the fact that smoking is dangerous to the health of smokers; that tobacco smoke in a confined area creates a health hazard to nonsmokers suffering from heart disease, respiratory diseases or allergies related to tobacco smoke; and that smoke in a confined area may be irritating and annoying to non-smokers and violates their privilege of breathing air relatively free from tobacco smoke contamination, every effort will be made to provide an environment reasonably free of such contaminants."

Part 1-60-40C. sets out policy implementation directives concerning work areas:

> "Work Areas
>
> (1) Separation of Smokers and Non-smokers
>
> In consideration of the rights of nonsmokers in work areas, they will, within practical limits, be given the opportunity to be assigned to offices or workplaces separate and physically distinct from those of employees who smoke. The following provisions will apply in making these determinations:
>
> -1- Efficiency of work units or administrative effectiveness shall not be impaired.
>
> -2- Excessive costs will not result from providing physical separation.
>
> -3- Additional space will not be required.
>
> (2) In common work areas, in which two or more employees are assigned, supervisors will prohibit smoking if an employee objects in writing to tobacco smoke in the immediate work environment on the basis that it is having an adverse effect upon his or her health.
>
> (3) Recognizing the rights of smokers who continue to smoke, supervisors will establish areas in which smoking is permitted. Such areas will be conspicuously posted."

This policy is and has been the only Department policy on smoking at the work site.

For at least ten years prior to November 6, 1985 employees were free to smoke in the OHA/BHO with the only restriction being that smoking was not allowed in a hearing room while a hearing was in progress.

By memorandum dated October 22, 1985, Barbara J. Desveaux, a Hearing Assistant at the OHA/BOS, and a unit member stated, in writing, that smoking had exacerbated her allergic reaction and suggested that David Robbins, the Hearing Office Manager (HOM), take steps to alleviate the problem.

Desveaux had previously discussed her medical problem with cigarette smoking in the office with Robbins and he had obtained . . . "through the personnel office, any smoking policies and procedures that were then in effect." Several employees, including Desveaux, had asked to read the materials. After she had read the materials, she talked with Robbins and he advised her to put something in writing and he would follow the procedures. Desveaux had a physical impairment, an allergic reaction to cigarette smoke exposure, which has substantially limited her ability to work, a major life activity. Not only was she under a physician's care, but her claim for workers compensation was accepted by the U.S. Department of Labor, Office of Workers Compensation Program, subject to a second medical opinion regarding . . . "the length of your disability." Department of Labor, responsible for adjudicating federal employee, accepted her claims and processed her medical bills for payment. OHA Management thus regarded her as medically unable to work in a smoky environment.[1] Despite attempts at accommodation, such as moving Desveaux, placing fans and smoke eaters around her, and providing a baffle, Desveaux's health kept deteriorating. Desveaux had to take time off because of her condition and had filed a grievance previously about smoking in the office.

The unit employees in OHA/BOS work in the common area outside the private offices. The common area is undivided by any wall and is contiguous to the hearing rooms and private offices. Private offices are occupied by Administrative Law Judges, staff attorneys and the HOM. There are approximately eight smokers out of the approximately 25 bargaining unit employees in OHA/BOS. Legal Clerks are closely associated with the judges for whom they provide legal clerical work and are physically located outside that judge's office. Unit employees cannot work solely at their desk but move around freely, entering and exiting judges offices, hearing rooms, and the HOM's office, as well as using the photocopier. Employee rest rooms are located at the rear of the office and, of necessity, employees must cross the office to use them.

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[1] Desveaux submitted medical bills and reports which substantiated the fact that her health was being adversely affected by the smoke in the Boston Office.

On October 31, 1985, OHA/BOS was in the process of implementing functional teaming. Functional teaming created two organizational groups of equal size, teams or modules, each containing hearing assistants and legal clerks. Legal clerks are located outside the judges office for to whom they work. Functional teaming replaced the earlier unit system whereby each judge would have an individual hearing assistant, legal clerk and other support staff assigned to him or her. Clerk-stenographers, unit employees were not placed in the functional teams. Functional teaming was guided by the MOU and involved movement of staff and seating arrangements, which were completed during the first week in December 1985.

Hearing Assistants provide a variety of support services to the OHA/BOS ALJs, including pre-processing of rough case files received in the office, writing summaries, and ensuring that pre-hearing case development is accomplished. Legal Clerks schedule hearings, monitor hearings and ensure that post hearing development is completed. Clerk-stenographers type the decisions.

Smoking, was a matter of concern to OHA/BOS employees and became a problem at approximately the end of 1984. Jill Ryan, a staff attorney also complained about "the cloud hanging halfway down the whole Boston office." Management procured baffles, obtained smoke eaters and moved employees. Judge Satter, the Regional Administrative Law Judge and the Acting Administrative Law Judge in charge of OHA/BOS, and Hereen Shea, the HOM at that time, had discussed the matter with Lisa Mattie, a Hearing Assistant and Vice-President of NTEU Chapter 236. Satter had also discussed the Desveaux problem with Mattie before issuing his Memorandum of October 30, 1985, discussed below. He stated his need to take action because everything which had been done to date to accommodate Desveaux had failed and her health continued to deteriorate. Satter requested input from Mattie and received none. Robbins had also discussed the matter two or three times with Mattie before Desveaux's October memorandum, and stated that Management probably would have to take an action, and solicited any ideas she might have on the matters. Robbins also had several discussions with Mattie after the Desveaux memorandum, advised her that a written request to do something about an individual's problem with smoking had been received, and that Satter would be making a decision.

He asked for input. Mattie's proposal was to divide the office, smokers and non-smokers.[2]

By memorandum dated October 30, 1985, Satter, the Regional Administrative Law Judge, who had also been acting as the Administrative Law Judge in Charge of OHA/BOS, banned smoking in the common area in OHA/BOS, effective November 4, 1985. On October 31, 1985, this memorandum, as well as a memorandum from the Office of the Secretary of HEW signed by Kevin M. Boyle for John F. Bean, Jr., dated April 3, 1979, a memorandum signed by the Secretary of HEW Joseph A. Califano, dated January 11, 1978 and a memorandum signed by David S. Robbins dated October 31, 1985, were given to the employees, including Mattie.

By letter to Satter dated October 31, 1985, Mattie referred to his memorandum dated October 30, 1985 and stated that ". . . NTEU hereby invokes its right to negotiate over the above mentioned change. In addition, the NTEU requests that this change be held in abeyance pending the outcome of formal face to face bargaining." The letter was addresses to OHA/RO. Mattie also telephonically requested to bargain over this change.

In response to Mattie's telephone call of October 31, 1985, during which she requested bargaining, Satter and Robbins met with Mattie that same date. At this meeting, Mattie repeated her previous request, namely, rather than imposing a complete ban on smoking, that the office be split into smoking and non-smoking sections. Mattie testified that Satter expressed concerns about ". . . complying with the agency's directive," that to accept her proposal would mean redefining there term "common work areas." Satter according to Mattie, said he'd have to contact Jim Donovan of the Labor Relations office. Satter testified at the hearing that he ". . . didn't meet with her to negotiate or to bargain on it. I met with her to tell her that I was going to find something out further, get some further advice, and then I or someone would get back to her, and Judge Greenberg[3] got back to her."

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[2] With respect to these conversations I credit Satter's and Robbin's versions. I find they were credible with fairly accurate memories. I found Mattie less reliable.

[3] Judge Greenberg came on as the new OHA/BOS Chief ALJ.

Mattie testified that "The meeting ended with my confirming or assuming that the change would be held in abeyance, until the parties did reach an agreement and Satter responded, I don't care, or that's OK, or something to that effect." Later, that same day, Robbins spoke with Mattie and requested to hold off bargaining until the following Monday to include Greenberg.

On November 5, according to Mattie, she spoke briefly to Greenberg. He asked her to refrain from smoking at her desk because he found it personally disturbing. Mattie agreed to accommodate this request but stated that she hoped that this wasn't a formal bargaining session. Greenberg agreed to meet "again" more formally and advised her he was looking into ventilation for a smoking room. Mattie did not respond to this initiative. Greenberg said he had banned smoking completely in his Springfield Office and that he had a problem with smoking rooms. Mattie made no request to delay implementation.

The smoking ban was implemented on November 6, 1985.

By memorandum to Greenberg, dated November 6, 1985, Mattie reiterated NTEU's bargaining demand of October 31, 1985 to Judge Satter, i.e. ". . . its right to negotiate impact and implementation of the above change at the Boston Hearing Office. The letter further states "On that same date, I met with Judge Satter and Hearing Office Manager, Dave Robbins. Compromises were discussed in an attempt to provide for the rights of all individuals, smokers and non-smokers alike. Since an agreement, however was not reached among the parties, it was my understanding that the above change was to be held in abeyance."

By memorandum dated November 12, 1985, Satter responded stating that, although he did not feel that adherence to policy was negotiable, he did see a need "to make reasonable accommodation for smokers" and referred the matter, again, to Greenberg and Robbins.

Be memorandum dated November 15, 1985 to Greenberg, Mattie, after first referring to a bargaining session held that morning, requested ". . . that management develop a support staff seating arrangement, consistent with our Collective Bargaining Agreement, by 10 A.M. Monday, November 18, 1985." Attached to this memorandum was a copy of page 52 of the CBA, which had Section 12 of Article XXVI circled.

By memorandum hand delivered to Greenberg on November 20, 1985, Mattie submitted four additional proposals.

Robbins attended a meeting with Mattie and Greenberg on November 15, 1985 and a second meeting with Robert Talbot, a Union representative, Mattie and Greenberg on November 21 or 22, 1985. At the second meeting they discussed the Califano materials, and Robbins stated that management had to respond within a certain timeframe, that management had properly responded to Desveaux's situation and that he "didn't see that we had any other option on this." Robbins told Mattie that he wanted to continue to talk about where a smoking room might be and how we might set it up and ventilation and that sort of thing. Talbot said that he didn't want to have official discussions on his because he felt that OHA/BHO had violated appropriate procedures by what it had done, and that Talbot didn't want to legitimize that violation by sitting down and talking officially about where the smoking room would be.

By memorandum dated December 3, 1978 to Greenberg and Robbins, Mattie submitted alternative sets of proposals including that the agency should separate smokers and non-smokers within the common work areas. The alternative set of proposals provided that, if Management refused to designate separate smoking work sites, that reasonable down time would be granted for smokers and that the library would remain the "temporary work area," pending the outcome of air quality ventilation evaluation. Agency abeyance was not requested.

The HOM continued to attempt to respond to the Union requests, including meeting with Mattie, providing a ceiling exhaust fan and clean air machines in the smoking area, and arranging for similar space for non-smokers. With regards to "down time", Robbins advised Mattie, that as long as phones were answered and work was done, he would not look over any shoulders and that, in fact, an orderly flow of work continued after the ban. Additionally, some employees could and did bring some work into the smoking room.

Discussion and Conclusions of Law

The facts in this case establish that smoking was banned in the common work area in the OHA/BHO without appropriate advance notice to NTEU and Respondent refused NTEU's request to bargain about the decision.

The FLRA has held that, absent certain privileges, failing to provide appropriate advance notice and an opportunity to bargain to a collective bargaining representative about a change in working conditions constitutes a violation of Section 7116(a)(1) and (5) of the Statute. See Social Security Administration, 16 FLRA 674 (1984).

In the instant case the record establishes that the employees in the common work area of the OHA/BHO had been free to smoke at their desks for at least ten years prior to October 31, 1985. Further, I conclude that the freedom to smoke at one's desk is a condition of employment and, absent some specific privilege on managements part, the collective bargain representative is entitled to advance notice and an opportunity to bargain over any decision by agency management to change this smoking policy.

The record in the instant case establishes that Respondent's management decided to ban smoking in the common work area of the OHA/BHO and did ban such smoking effective November 6 without sufficient advance notice to the union and management refused all of NTEU's requests to bargain about the decision to change the smoking policy and to postpone the effective date of such change until there had been bargaining. In so concluding I note that although NTEU received notification of the change on October 31, 1985, the change to be effective November 4, 1985, and NTEU immediately asked to bargain. Respondent was merely announcing a decision it had already made and was not notifying the Union so bargaining could take place. Respondent was announcing a decision. Further, although the parties met and held conversations about the change on October 31 and November 5, the change went into effect November 6, 1985 and those conversations did not amount to or constitute bargaining. At most Respondent listened to the Union's ideas, but the meetings did not consist of the give and take of bargaining. Rather Respondent's conduct during these conversations and subsequent ones was such as to make it clear that Respondent considered the substance of the change to be non-negotiable. Thus, the October 31 notice was not notice to invite bargaining, but rather to announce a final decision that had already been made and was non-negotiable.

The CBA executed on October 8, 1985 specifically provides in Article II, Section 1, that "In the administration of conditions of employment covered by the Agreement, the parties are governed by this Agreement, existing and future Employer rules, regulations and policies not in conflict with this Agreement, ..." The CBA in Article XXVI dealt with the obligation provide a safe work place and, in Section 12, the problem of separating smokers and non-smokers when requested by a non-smoker. Thus the CBA generally dealt with smoking and the accommodation of smokers and non-smokers. Thus, although under the CBA the Union had agreed that the Califano smoking policy would be in effect, the effective date of the contract was December 7, 1985, after the new smoking policy went into effect.

With respect to the MOU, the fact that it provides that Respondent should make accommodations for non-smokers, does not constitute a waiver by the Union of its statutory right to appropriate notice and an opportunity to bargain about banning smoking in common areas or similar changes in smoking policy. Any such waiver of the Union's right to notice and to bargain about such changes should be clear and unmistakable on its face. With respect the handicapped MOU provided accommodations be made as required by rule or regulations. Part 1-60-40C of the General Administrative Manual deals with smoking in the work areas and not the rights of the handicapped. Thus, this portion of the MOU does not apply to the subject situation. In any event, it is not, on its face, a clear and unmistakable waiver by the Union of its right to notice and to bargain about the subject change.

Thus, I conclude that Respondent did not give appropriate notice to NTEU and failed and refused to bargain with NTEU concerning the banning of smoking in the OHA/BOS, and thereby violated Section 7116(a)(1) and (5) of the Statute.

Respondent contends that bargaining about the smoking change would have resulted in an interference with its functional teaming decision and thus would have interfered with management's rights under Section 7106 of the Statute. Respondent specifically points to Mattie's suggestion that smokers be seated together, which suggestion, Respondent urges, would interfere with functional teaming, the "technology methods, and means of performing work" as defined in § 7106(b)(1) of the Statute. Such contention is rejected. Merely because one of NTEU's proposals might have interfered with Respondents § 7106 rights, did not mean Respondent was privileged to refuse to bargain entirely about the decision to ban smoking. The bargaining itself might have come up with good and reasonable suggestions that would not have unduly interfered with management's rights.

Respondent further urges that it could not bargain because it was bound by the HHS smoking policy as set forth in Califano's memorandum and the implementations set forth in the General Administrative Manual. Section 7117 of the Statute provides that the duty to bargain shall extend to matters which are the subject of any agency rule or regulations only if the FLRA has determined that no compelling need exists for the rule or regulation. Section 2424.11 of the FLRA's Rules and Regulations provides:

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.
>
> (b) The rule or regulation is necessary to insure the maintenance of basic merit principles.
>
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

I conclude that although the sections General Administrative Manual constitutes agency rules and regulations, the record here hardly establishes a compelling need for such rules and regulations as they applied to smoking. Thus, although they might be helpful or desirable, they have not been shown to be essential. Further Respondent's contention that such regulations are "necessary to insure the maintenance of basic merit principles" is rejected. Although the subject no-smoking rules may help or foster the "merit principals," they have not been shown to be "necessary" or that they are the only way to foster such merit principals. Thus, Respondent's contention with respect to compelling need is rejected.

Thus, I conclude that Respondent violated Section 7116(a)(1) and (5) of the Statute by unilaterally instituting its no smoking policy in the OHA/BOS without appropriate notice to NTEU and without bargaining with NTEU concerning the change.

With respect to the appropriate remedy, because of the nature of smoking and the health hazards of secondary smoke I conclude a status quo ante remedy is not appropriate. Further, I note that the General Services Administration has issued new "Smoking Regulations;" 41 CFR Part 101-20; Federal Register Vol. 51, No. 235; page 44258; Monday, December 8, 1986; which may have an effect on the OHA/BOS.

Having concluded that Respondent violated Section 7116(a)(1) and (5) of the Statute, I recommend that Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute it is hereby ordered that the Department of Health and Human Services, Office of Hearings and Appeals, Region I, Boston, Massachusetts shall:

1. Cease and Desist from:

(a) Changing established conditions of employment concerning smoking without first notifying the National Treasury Employees Union, the exclusive representative, and affording it an opportunity to bargain concerning the change to the extent consonant with law and regulations.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request bargain with the National Treasury Employees concerning the change in smoking policy instituted in the Boston Hearings Office, to the extent consonant with law and regulations.

(b) Provide National Treasury Employees Union with appropriate Notice of any future change in smoking policy which effects employees in the unit represented by the National Treasury

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.
>
> (b) The rule or regulation is necessary to insure the maintenance of basic merit principles.
>
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

I conclude that although the sections General Administrative Manual constitutes agency rules and regulations, the record here hardly establishes a compelling need for such rules and regulations as they applied to smoking. Thus, although they might be helpful or desirable, they have not been shown to be essential. Further Respondent's contention that such regulations are "necessary to insure the maintenance of basic merit principles" is rejected. Although the subject no-smoking rules may help or foster the "merit principals," they have not been shown to be "necessary" or that they are the only way to foster such merit principals. Thus, Respondent's contention with respect to compelling need is rejected.

Thus, I conclude that Respondent violated Section 7116(a)(1) and (5) of the Statute by unilaterally instituting its no smoking policy in the OHA/BOS without appropriate notice to NTEU and without bargaining with NTEU concerning the change.

With respect to the appropriate remedy, because of the nature of smoking and the health hazards of secondary smoke I conclude a status quo ante remedy is not appropriate. Further, I note that the General Services Administration has issued new "Smoking Regulations;" 41 CFR Part 101-20; Federal Register Vol. 51, No. 235; page 44258; Monday, December 8, 1986; which may have an effect on the OHA/BOS.

Having concluded that Respondent violated Section 7116(a)(1) and (5) of the Statute, I recommend that Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute it is hereby ordered that the Department of Health and Human Services, Office of Hearings and Appeals, Region I, Boston, Massachusetts shall:

1. Cease and Desist from:

(a) Changing established conditions of employment concerning smoking without first notifying the National Treasury Employees Union, the exclusive representative, and affording it an opportunity to bargain concerning the change to the extent consonant with law and regulations.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request bargain with the National Treasury Employees concerning the change in smoking policy instituted in the Boston Hearings Office, to the extent consonant with law and regulations.

(b) Provide National Treasury Employees Union with appropriate Notice of any future change in smoking policy which effects employees in the unit represented by the National Treasury

Employees Union and upon request, will bargain with the National Treasury Employees Union concerning the proposed change, to the extent consonant with law and regulations.

(c) Post at its Boston Hearing Office copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Such forms shall be signed by a responsible official, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: February 27, 1987
Washington, D.C.

[1-CA-60076]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change established conditions of employment concerning smoking without first notifying the National Treasury Employees Union, the exclusive representative, and affording it an opportunity to bargain concerning the change to the extent consonant with law and regulations.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request bargain with the National Treasury Employees concerning the change in smoking policy instituted in the Boston Hearings Office, to the extent consonant with law and regulations.

WE WILL provide National Treasury Employees Union with appropriate Notice of any future change in smoking policy which effects employees in the unit represented by the National Treasury Employees Union and upon request, will bargain with the National Treasury Employees Union concerning the proposed change, to the extent consonant with law and regulations.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 10 Causeway Street, Room 1017, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.

*U.S. GOVERNMENT PRINTING OFFICE:1987-181-223:60008